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No. 82-1002

IN THE

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,
Petitioner,

vs.

STATE DIVISION OF HUMAN RIGHTS,
on the complaint of DARYL CLARKE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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Questions Presented

1. Where an employer has actually accommodated the religious beliefs of an employee, can the State of New York require more than reasonable accommodations under Section 296.10(c) of Executive Law?

2. If more than reasonable accommodation is required by the State, does such requirement constitute a violation of the Establishment Clause of the First Amendment to the United States Constitution?

3. Does the First Amendment of the United States Constitution require a uniform standard to be applied by all the states in dealing with questions of discrimination based on creed?

4. Is a state court preempted by federal labor law from compelling an employer to accommodate an employee in the observance of his sabbath in a manner inconsistent with a valid collective bargaining agreement?

5. Is the application of the substantial evidence test to the constitutional issue herein a denial of due process of law in that it denied the employer a review concerning the merits of the discrimination claim?

List of Parties

In addition to the parties listed in the caption, Gary Jordan, a Superintendent of Carnation Company, was a party to the proceedings herein. The complaint was dismissed as to him by the Commissioner of New York State Division of Human Rights in his Decision and Order of June 18, 1979. Truck Drivers and Helpers Union Teamsters Local No. 649 was joined as a necessary party during the course of the hearings but no judgment or decree was entered against it.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Carnation Company [hereinafter "Carnation"] hereby petitions for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, enabling this Court to review the decision and order in *State Division of Human Rights v. Carnation Company*, 86 A.D.2d 977, 448 N.Y.S.2d 331 (4th Dep't. 1982).

Opinions Below

Initially, a Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department in *State Division of Human Rights v. Carnation Co.* was rendered wherein and whereby that court unanimously held that Carnation had reasonably accommodated its employee, Daryl Clarke as to his religious beliefs and as a result dismissed his complaint. This decision is reported at 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976) and is reprinted as Appendix [hereinafter "App."] A to the Petition. An appeal was taken to the New York Court of Appeals by the complainant Daryl Clarke and the New York State Division of Human Rights [hereinafter "NYSDHR"]. The New York Court of Appeals reversed and remanded to the NYSDHR for purposes of having that agency conduct a public hearing to develop a complete record. This decision is reported at 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869 (1977) and is reprinted as App. B. Thereafter a hearing was held by the NYSDHR and a Decision and Order of the Commissioner of the NYSDHR was made on June 18, 1979 wherein and whereby the Commissioner held that Carnation had discriminated against its employee on the basis of his religion but dismissed such charges against Gary Jordan as superintendent of Carnation. This decision of the Commissioner is not officially reported and is reprinted as App. C. An appeal was taken by Carnation from the Decision and Order of the Commissioner to the New York State Human Rights Appeal Board which summarily affirmed the Decision and Order of the Commissioner. This decision is not officially reported and is reprinted as App. D. A second appeal was then taken by Carnation to

the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department and on this second appeal the Appellate Division confirmed the Decision and Order of the Commissioner in a decision dated February 26, 1982 in the case entitled *State Division of Human Rights v. Carnation Co.* This decision is reported at 86 A.D.2d 977, 448 N.Y.S.2d 331 (4th Dep't. 1982) and is reprinted as App. E.

Jurisdiction

The order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department unanimously affirming the June 18, 1979 Decision and Order of the Commissioner of the NYSDHR was entered on February 26, 1982 (App. F). On May 14, 1982, that same court denied without opinion Carnation's motion for leave to appeal to the New York State Court of Appeals (App. G). Carnation then made a direct application for leave to appeal to the New York State Court of Appeals which application was denied without opinion on September 16, 1982. It is officially reported at 57 N.Y.2d 606 (1982) and is reprinted as App. H.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Statutory Provisions Involved

The statutory provisions involved are reprinted in App. I.

Statement of the Case

Carnation Company maintains a plant in South Dayton, New York, in which it produces canned evaporated milk. It employs an approximate total of twenty-one (21) hourly employees in its "canning" operations which relate to the issue herein, covering two (2) shifts. The hourly employees are covered by a collective bargaining agreement entered into by Carnation with the Truck Drivers and Helpers Teamsters Local Union 649 and were so covered during all of the relevant time periods herein.

The agreement provides in part that the normal workweek will be "five (5) days, Monday through Sunday", consisting of forty (40) hours per week. It further provides that "employees shall receive two (2) days off each week and relief days so far as possible, are to be rotated". This provision is intended to provide all of the employees affected, the opportunity to experience Saturday as a day off in a rotation system.

The Complainant, Daryl Clarke, [hereinafter "Clarke"], began his employment with Carnation on April 8, 1967, and thereafter was within the bargaining unit represented by Local Union No. 649 and covered by the collective bargaining agreement. In May of 1969, in accordance with the collective bargaining agreement, he bid for the job of Labeler Operator Bracket I and was successful. The job of Labeler Operator Bracket I is considered a skilled job and requires job training which was given to Clarke. There are three positions of Labeler Operator Bracket I. There are two shifts of employment and a Labeler Operator is assigned to each shift. The third Labeler Operator is used for relief. The Labeler Operators rotate their shift assignments on a weekly

basis. The established work practice provides that the employee who is assigned to the "early" shift in a given week, shall have Saturday off in that week. This established work practice is further preserved by the collective bargaining agreement under the "Prevailing Practices" clause contained therein. Clarke worked under and in accordance with these established procedures as a Labeler Operator until some time in September, 1971.

Approximately four years and five months after he began his employment, he converted to the religion of a Seventh Day Adventist sometime in September, 1971. As a result of this conversion, he advised Carnation that because of his religious beliefs, he would not work on Saturdays, since he recognized that day as his sabbath which sabbath period begins at sundown Friday and ends at sundown Saturday.

After being so advised by Clarke, Carnation took the initiative in accommodating him in the practice of his religious beliefs by switching his days off with other employees in a manner that was not in keeping with the normal established practice. As a result, a grievance was filed on November 27, 1971, by Frank K. Wilson, a fellow employee, wherein he protested this method of accommodation as being in violation of the "general rule" under the collective bargaining agreement and insisted that Clarke be made to comply with the established system. Since the grievance of Wilson was upheld and, in order to once again accommodate Clarke, Carnation advised him that he would be permitted to enter into a voluntary agreement with his two fellow Labeler Operators, Michael Blair and David E. Clark, wherein and whereby they would agree to work in his place on those Saturdays for which he was scheduled to work.

Because of the extremely perishable nature of the product, it is imperative that production as scheduled take place and, therefore, it is necessary to have a Labeler Operator present for such production. This voluntary arrangement between Clarke and the other two Labeler Operators was effectuated sometime in 1971 and continued in effect until July of 1973.

In July of 1973, Carnation was advised by representatives of Local Union No. 649 that the other two Labeler Operators no longer agreed to work every Saturday and that it would now be necessary for Clarke to work his scheduled Saturdays. Clarke was advised of this in a letter from Carnation dated July 5, 1973. He was further advised that by reason of this development, there were three alternatives which could be applied to the problem, *i.e.*, (1) Clarke could transfer to a Bracket III general labor job with less pay, but without the requirement of Saturday work; (2) terminate his employment, or (3) create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity only on Saturdays and then perform work in a lower bracket job the remaining four days of the week, but at the higher rate of pay assigned to a Labeler Operator as required by the collective bargaining agreement. Clarke was advised that the third alternative was not economically feasible and, therefore, would not be implemented.

Thereafter, Clarke advised Carnation by letter dated July 12, 1973, that he would continue to require his sabbath off by reason of his religious convictions. He apparently also requested Local Union No. 649 to intercede in his behalf and was advised by a representative of the organization that he should choose one of the alternatives proposed to him by Carnation.

On or about July 23, 1973, Carnation received written notices from Michael Blair and David E. Clark that they refused to work for Clarke on his scheduled Saturdays. Once again, Carnation attempted to accommodate Clarke by offering him alternative employment in the Labor Classification which did not involve Saturday work. He was also advised that he would suffer no loss of seniority rights or other fringe benefits with the exception of a slight reduction in pay. The job offered in Bracket III was the *only* job available at the time that did not require Saturday work. On or about August 3, 1973, Clarke advised Carnation that he would not work on Saturdays. Thereafter, Clarke accepted Carnation's offer and took the Bracket III job classification. As a Labeler Operator Bracket I, he was earning $3.63 per hour at that time and the Bracket III General Labor position paid $3.13 per hour, a reduction of only fifty cents ($.50) an hour.

In October of 1976, an opening in Bracket II as a Warehouseman occurred and Clarke bid for that job. As a Bracket II job, the hourly rate of pay was twenty-five cents ($.25) an hour less than the Bracket I jobs as established under the collective bargaining agreement. Clarke was awarded the Warehouseman's job and worked in that position from October, 1976, to February 18, 1980. Although the Warehouseman's job is a shift work position, *i.e.*, first and second shift and also involves a regularly scheduled work day on Saturday, Carnation again took the initiative and made arrangements to accommodate Clarke so that he did not have to work after sundown on Fridays and on Saturdays.

In September of 1977, an opening in the position of Labeler Operator occurred and Clarke bid for that posi-

tion knowing that the position required shift and Saturday work as part of the regular, normal schedule of the job. In a further attempt to accommodate Clarke in his bid for the Labeler Operator position, Carnation canvassed its other employees in an effort to determine if Clarke could be accommodated in working this job by having other employees substitute for him during his sabbath when he would normally be scheduled to work that time period. Carnation was advised by Clarke's fellow employees that they would not substitute for Clarke. Thereafter in a further effort to accommodate Clarke, Carnation also held discussions with Clarke's union representatives to determine if the Union had any possible solutions to the problem and the question of accommodation and the Union advised that it did not. Clarke was advised of this and was further advised that there were no other means of reasonably accommodating him in keeping the Labeler Operator job without working the required schedule.

Since Clarke advised Carnation that he would not work the scheduled days of the Labeler Operator's job as they related to his sabbath, the job was then awarded to the next senior employee and Clarke continued in his employment as a Warehouseman, Bracket II until February 18, 1980, at which time he bid for and was awarded the position of Babcock Tester/Relief Person in the laboratory which is a Bracket I job paying the same rate of pay as the position of Labeler Operator and does not require Saturday work. Clarke currently holds this position and has always been employed by Carnation without any loss of time and has never had to work on his sabbath or religious holidays.

On or about October 16, 1973, Clarke filed a verified complaint with the NYSDHR charging Carnation with discrimination based on religion and Carnation filed a verified answer in response. On or about October 25, 1974, the NYSDHR, after investigation, issued a Determination and Order wherein and whereby it found that there was "no probable cause" to believe that Carnation had engaged in or was engaging in the unlawful discriminatory practice complained of and dismissed the complaint.

Clarke appealed the determination of "no probable cause" to the New York State Human Rights Appeal Board on October 30, 1974, which appeal was heard on March 19, 1975. The Appeal Board rendered its Decision and Order on or about January 13, 1976, wherein and whereby it reversed the finding of "no probable cause" and remanded the case to the NYSDHR for a public hearing on the complaint.

The Decision and Order of the Appeal Board was appealed by Carnation to the New York State Supreme Court, Appellate Division, Fourth Judicial Department on February 11, 1976, and on July 12, 1976, that court unanimously annulled the Decision and Order of the Appeal Board holding that there was "substantial evidence that the employer made every reasonable effort to accommodate Clarke and to allow him to continue his employment" and ordered that the original determination of "no probable cause" be reinstated and the complaint be dismissed. *State Division of Human Rights v. Carnation Co.*, 53 A.D.2d 1053, 1054, 385 N.Y.S.2d 888, 890 (4th Dep't. 1976) (App. A).

An appeal was taken by Clarke to the New York Court of Appeals from the Decision and Order of the Appellate

Division, Fourth Department on September 16, 1976, and the Court of Appeals, by way of a Memorandum Decision dated June 7, 1977, reversed the Order of the Appellate Division and remitted the case to that court with directions to remand the case to the NYSDHR for a full evidentiary hearing by reason of the fact that the record was not "sufficiently developed to determine, as a matter of law, whether retaining Clarke in his former position would have resulted in undue economic hardship to the employer." *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873, 874, 397 N.Y.S.2d 781, 782, 366 N.E.2d 869, 870 (1977) (App. B).

An evidentiary hearing was held by the NYSDHR on February 15, 1978, and continued on April 6, April 7, May 18, June 22 and October 19, 1978, at which time Carnation established by substantial evidence the many acts of accommodation set forth above. Carnation also established that to permit Clarke to work as a Labeler Operator and also observe his sabbath would involve more than *de minimus* cost to Carnation in that it would have to create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity only on Saturday and then perform work in a lower bracket job the remaining four days, but at the higher rate of pay assigned to a Labeler Operator as required by the collective bargaining agreement. Following the hearing, briefs were filed at which time Carnation argued that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) was totally dispositive of the accommodation issue herein. The Commissioner of the NYSDHR, however, specifically disagreed (App. C, p. 54) and held on June 18, 1979, that Carnation but not Gary Jordan had discriminated against Clarke in violation of Section 296.10 of the New York Executive Law.

An appeal from the Decision and Order of the Commissioner was taken by Carnation to the Appeal Board on June 28, 1979. Carnation again argued that it had "reasonably accommodated" Clarke and that for the State of New York to require it to do more would not only constitute an unlawful "undue economic hardship" but would result in a violation of the First Amendment of the United States Constitution. Such action would also force it to violate its obligations under the collective bargaining agreement. On February 18, 1981, the Appeal Board summarily affirmed in all respects the Decision and Order of the Commissioner on the ground that the Decision and Order appealed from was supported by substantial evidence (App. D). Thereafter, the NYSDHR invoked the jurisdiction of the Appellate Division, Fourth Department, to enforce the Order of the Commissioner and Carnation filed a Cross Petition to annul and vacate the Order. On or about February 26, 1982, the Appellate Division, Fourth Department, by way of a Memorandum Decision, unanimously sustained the Order of the Commissioner, dismissed the Cross Petition and granted an Order of Enforcement (App. F). As discussed in the Jurisdictional Statement above, leave to appeal to the New York Court of Appeals was first sought from the New York Supreme Court, Appellate Division, Fourth Judicial Department which denied said application on May 14, 1982 (App. G). Thereafter, Carnation made direct application for leave to appeal to the New York Court of Appeals which application was denied on September 16, 1982 (App. H). Carnation now petitions this Court for a writ of certiorari to enable it to review the decision below.

REASONS FOR GRANTING THE WRIT

The decision below raises serious constitutional questions relative to the Establishment Clause of the First Amendment of the United States Constitution by reason of the application of Section 296.10 of the Executive Law of the State of New York. By its application and the mandate required of Carnation, the State of New York will find itself unduly entangled in enforcing the religious beliefs of its citizens, because it has clearly advanced the religious beliefs of some by demanding unreasonable accommodations from others.

Furthermore, a claim of religious discrimination is totally different from the claims of discrimination based on race, sex, national origin, age and disability by reason of the First Amendment. Since First Amendment rights are involved, a uniform national standard is absolutely necessary and required rather than fifty different state standards. Such national standard, which encourages reasonable accommodation to correct religious discrimination but denies governmental support which establishes certain beliefs over others, has already been established by this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) and the Decision and Order of the Commissioner of the NYSDHR herein, as affirmed by the New York courts, is contrary to such standard.

Not only must there be a uniform national standard applied to employees as to their religious belief, there must also be a uniform national labor policy under the federal labor laws if collective bargaining agreements are to remain viable and effective. The Decision and Order of the Commissioner of the NYSDHR herein totally ignores this concept.

Finally, the application of the substantial evidence test to the constitutional issues raised constitutes a denial of due process of law since the Petitioner has not received a review concerning the merits of the discrimination claim.

I. The First Amendment Issue

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) [hereinafter "*Hardison*"], this Court did not reach the issue of whether requiring an employer to make more than reasonable efforts to accommodate an employee's sabbath beliefs violated the Establishment Clause of the First Amendment of the United States Constitution. The Court was able to avoid passing on this issue only because it held that the statute involved could not require more than reasonable accommodation. However, Section 296.10 of the Executive Law of the State of New York as applied in the present case, rejects the rule of reasonable accommodation and requires far more, namely, virtually absolute accommodation. Thus, the establishment issue is clearly present here.

The Court in *Hardison* was well aware of the serious constitutional problem which would be raised by requiring more than reasonable accommodation. As Justice White noted: "the District Court voiced concern that if it did not find undue economic hardship in such circumstances, accommodation . . . might . . . raise significant questions . . . under the Establishment Clause." *Id.* at 69-70, n.4. Other courts have held laws prohibiting discrimination against Sabbatarians constitutional only where they required no more than reasonable accommodation. *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976); *American Motors Corp. v. Department of In-*

dustry, Labor and Human Relations, 21 FEP Cases 654 (Wis. Ct. App. 1979); *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 157 Cal.Rptr. 907, 593 P.2d 852 (1979), *appeal dismissed*, 444 U.S. 986 (1979).

The NYSDHR, however, specifically refused to apply *Hardison* in the present case. As the Commissioner stated:

> Respondents argue that the United States Supreme Court's decision in the matter of *Hardison v. Trans World Airlines*, 432 U.S. 63 1977) (sic) concerning Sabbath observance is controlling upon this proceeding. I do not agree. It would appear that the *Hardison* decision was decided under Title VII of the federal Civil Rights Act of 1964 (citation omitted), a general statute without specific reference to Sabbath observance. That statute also insulates, by specific provision, bona fide seniority rights created by collective bargaining agreements, and such seniority rights were a factor in the Hardison case, (citation omitted). The New York law contains no such insulating provision. Moreover . . . Complainant's seniority as compared to other employees was never presented as an issue. (App. C, pp. 53 and 54).

Hardison, however, hardly has such a narrow scope and trivial meaning. The Court in *Hardison* held that "reasonable accommodation" did not require an employer to take any action which gave a preference to particular religious beliefs. To require more would create a serious establishment problem.

In the Court of Appeals for the Eighth Circuit, Hardison had successfully argued that "reasonable accommodation" meant that his religious needs should take precedence over the collective bargaining agreement which allocated days-off according to seniority and the preference of other employees who desired Saturdays off.

However, in reversing that decision, this Court held that an employer could not deny the "shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81.

The Court of Appeals for the Eighth Circuit also held that the employer had failed to consider two other reasonable means of accommodation. The employer could have allowed Hardison to work a four day week and used someone working elsewhere in the company on Saturdays to perform Hardison's work. Alternatively, the employer could have used one of its weekday employees to substitute for Hardison on Saturday, even though this would have involved paying premium wages. But, this Court held that both alternatives were unreasonable because they preferred particular religious beliefs:

> Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.
>
> * * *
>
> [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they would want would *involve unequal treatment of employees* on the *basis of their religion*. *Id.* at 84. (Emphasis added).

Hardison, then, stands for the rule that an employer cannot be compelled to violate a collective bargaining agreement, require another employee to substitute involuntarily, or incur any cost in efficiency or dollars, which is more than *de minimus*, in order to accommodate Sabbatarian beliefs because this "would involve unequal treatment of employees on the basis of their religion." *Id.* By rejecting the rule that only reasonable accom-

modation which does not give a preference to particular religious beliefs can be required of an employer, the NYSDHR clearly crossed the constitutional boundary. To require more than reasonable accommodation creates an establishment of religion.

Nor is there any doubt that the NYSDHR went far beyond the limit of reasonable accommodation. The first part of *Hardison* is devoted to specifying what constitutes reasonable accommodation. This Court held that "TWA made reasonable effort to accommodate" when it took the following acts: meetings with the plaintiff to find a solution, accommodating the plaintiff's observance of his special religious holidays (other than Saturdays), authorizing the union steward to search for someone who would swap shifts and attempting unsuccessfully to find the plaintiff another job.

Carnation's efforts at accommodation were far more extensive in degree and duration. They included:

> (a) switching Clarke's days off in a manner not in keeping with the established work practice so that he could continue in the Labeler Operator position;
>
> (b) permitting Clarke to enter into a voluntary arrangement with his two fellow Labeler Operators whereby they would substitute for him on Saturdays;
>
> (c) locating and offering to Clarke an alternate position in the General Labor Classification that did not involve Saturday work;
>
> (d) making arrangements for personnel changes so that Clarke could advance from the General Labor Classification to the higher paying position of Warehouseman and rearranging his work schedule so as to eliminate shift and Saturday work in his position;

(e) continuously canvassing other employees in an effort to find a volunteer to substitute for Clarke on Saturdays so that he could qualify for the Labeler Operator position; .

(f) requesting the union to waive the rotation requirement under the collective bargaining agreement;

(g) engaging in conferences with Clarke and the Union in an effort to resolve the problem, and

(h) meeting with representatives of Clarke's church in a further effort to accommodate his religious beliefs.

The NYSDHR dismissed these efforts as inadequate without any comment. Nevertheless, the NYSDHR's opinion does discuss one of the types of actions held to be reasonable in *Hardison*. There the employer's unsuccessful effort to find the plaintiff a job was considered reasonable accommodation. Here Carnation actually succeeded in finding Clarke another job, although at slightly lower pay, which allowed him to observe his Sabbath. It is important to note that at this point Carnation had exhausted all other reasonable means of keeping Clarke in the higher paying Labeler's job. As the findings of the NYSDHR indicate, Carnation allowed "the two other Labeler Operators [to cover] for Complainant on a temporary basis on Saturdays"; found a substitute for Frank Wilson who filed a "union 'grievance' " because "he was not receiving his Saturday's off on the rotating basis" stated in the collective bargaining agreement; and arranged for the two other Labelers to work in Clarke's place on Saturdays for almost two years, until "they informed Respondent they would no longer work on Saturdays in place of Complainant", (App. C, p. 46).

The NYSDHR did not recognize the reasonableness of the acts involved here, even though *Hardison* held such acts to be reasonable. Meetings with Clarke, the union and others, authorizing the union to search for volunteers to work in Clarke's place and not only seeking but finding Clarke another job, all constituted reasonable accommodation. Moreover, the NYSDHR failed to recognize that violating Wilson's preference and his collective bargaining agreement rights to have certain Saturday's off went beyond reasonable accommodation and created a preference for particular religious beliefs. An employer cannot "deny the shift and job preferences of some employees, and deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 81.

The other relevant findings of the NYSDHR also clearly go beyond the requirement of reasonable accommodation to create religious preference. *Hardison* held that where a union was unwilling to vary the terms of the agreement, an employer could not be compelled to "unilaterally arrange for a swap [since this] would have amounted to a breach of the collective bargaining agreement" and as demonstrated above, a religious preference. *Id.* at 79. The NYSDHR held that despite the lack of trained volunteers (App. C, p. 46) and the grievance of Frank Wilson (App. C, pp. 45 and 46), Carnation could be compelled to violate the relief days rotation provision of the union agreement and unilaterally arrange for other employees to substitute for Clarke, so that he could return to the Labeler position (App. C, p. 48).

Hardison also held that requiring an employer to bear more than *de minimus* inefficiency or costs to accom-

modate one employee "when no such costs are incurred to give other employees the days off they want would involve unequal treatment on the basis of their religion." *Id.* at 84. Carnation advised Clarke that to allow him to work as a Labeler and have Saturday off, it would have to hire a fourth Labeler but that it was " 'not economical to pay an employee for 40 hours per week at Bracket I pay and only receive 8 hours of Bracket I work.' " (App. C, pp. 46 and 47). The NYSDHR, however, invented the alternative of having an employee in a lower pay grade work four days a week in his regular job and substitute for Clarke as a Labeler on Saturdays, but this would involve exactly what *Hardison* found objectionable, that is, it would leave another job uncovered and cause inefficiency due to a lack of a trained replacement. Also contrary to *Hardison*, the NYSDHR held that Carnation, without consulting the union, could interpret the collective bargaining agreement to avoid paying the substitute at the higher rate of pay for working as a Labeler on Saturdays. Adding either extra cost or "compelling another employee to work involuntarily in [Clarke's] place," according to *Hardison*, involves allocating the privilege of having Saturdays off . . . according to religious beliefs." *Id.* at 85.

Thus, it is abundantly clear that the NYSDHR repeatedly demanded that Carnation perform acts of accommodation which *Hardison* held to be unreasonable and to "involve unequal treatment of employees on the basis of their religion." *Id.* at 84.

The test for determining whether governmental assistance constitutes establishment of religion was laid down in *Committee for Public Education and Religion v. Nyquist*, 413 U.S. 756, 772-773 (1973) [hereinafter

"*Nyquist*"] and *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) and, more recently, reiterated in *Meek v. Pittenger*, 421 U.S. 349, 358 (1975). As the Court in *Nyquist* stated:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive governmental entanglement with religion. . . . 413 U.S. at 773.

The New York State Executive Law, in relevant part, states that its purpose is "to eliminate and prevent discrimination in employment." N.Y. Exec. Law, §290 (McKinney, 1982). Section 296.10(a) of the Executive Law goes on to make it unlawful "to discriminate against any person in obtaining or holding employment, because of his observance of any particular . . . sabbath . . . ." Section 296.10(c) creates an exception (where the uniform application of terms and conditions of attendance is *essential* to prevent undue economic hardship to the employer." (Emphasis added). N.Y. Exec. Law §296.10(a)(c) (McKinney, 1982).

While it might be argued in the abstract that the elimination of religious discrimination in employment is a legitimate secular purpose, the language and application of Section 296.10(c) reveal a different purpose. The language of that section states that unless it is "essential" to prevent undue economic hardship, an employer must accommodate particular sabbath beliefs. As applied, Section 296.10(c) goes even farther. Repeatedly, as demonstrated above, the NYSDHR has required Carnation to take actions which are highly unreasonable and very preferential to particular religious beliefs. A secular

purpose of ending discrimination would strike an even balance between competing, legitimate needs and not compel employers and employees to clearly subordinate their legitimate needs and values to another's religious preference. Such subordination is not a "clearly secular legislative purpose." *Committee for Public Education and Religion v. Nyquist*, 413 U.S. at 773.

It is also abundantly clear that the present statute as applied here does not have "a primary effect which neither advances nor inhibits religion." *Id.* As Judge Celebrezze pointed out in his dissenting opinion in *Cummins v. Parker Seal Co., supra*:

> First, the religious accommodation requirement discriminates between religion and non-religion. Only those with "religious practices" may benefit from the rule. . . .
>
> Second, it discriminates among religions. Only those which require their followers to manifest their beliefs in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employee's accommodation. 516 F.2d at 558.

It is important to distinguish the accommodation or preference of religious beliefs required by the NYSDHR from reasonable acts of accommodation. Statutes and applications which require only reasonable accommodation may only provide the kind of incidental benefit to religion which has been found constitutional. *Meek v. Pittenger, supra.* It is far more difficult to justify the constitutionality of unreasonable accommodation which rather than merely redressing discrimination actually creates a preference for particular religious beliefs over other religions and other important non-religious values.

Finally, the statute as applied here does not "avoid excessive government entanglement with religion", as required under *Nyquist*, 413 U.S. at 773. As Judge Celebrezze in *Cummins v. Parker Seal Co., supra*, pointed out:

> Disposition of complaints . . . will require inquiry into the sincerity with which beliefs are held and force consideration of the nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters. 516 F.2d at 559.

Again, reasonable accommodation might not cause excessive entanglement because it would be self-policing. In the present case, the enormous sacrifices being required of the employer and other employees can be expected to produce continuing conflicts among various parties, all calling for governmental involvement.

For all of the foregoing reasons, it is clear that the kind of unreasonable accommodation required by the present statute as applied creates an establishment of religion. Therefore, it is respectfully requested that this Petition be granted to address this important question which presently remains unresolved.

II. The Federal Labor Law Issue

The collective bargaining agreement between Carnation and Local No. 649 by which Clarke was covered during all of the relevant time periods herein provided that the normal work week would be five days, Monday through Sunday, consisting of forty hours per week. It further provided for the rotation of relief days and for a system of seniority. Notwithstanding these provisions, Carnation in 1971 unilaterally changed Clarke's work schedule so as to give him his sabbath off contrary to the established work rule and collective bargaining provisions. As a

result the grievance of Frank K. Wilson was filed and upheld and Carnation was thereafter required to comply with the "rotation" provisions of the collective bargaining agreement.

The alternatives open to Carnation to accommodate Clarke, other than the one it chose, would be in violation of the neutral rotation system and seniority system in the collective bargaining agreement. If it decided to compel the other two Labeler Operators to rotate weekends every other week rather than every third week, it would clearly have violated the neutrality of the rotation and seniority system, and would be liable for breach of contract for such violation. Yet this is precisely what the NYSDHR has ordered Carnation to do. In his decision, the Commissioner stated:

> Respondents further contend that to grant Complainant the relief he seeks would cause a significant risk to industrial peace, since the bargaining agreements, as relating to rotation of relief days, . . . would be violated thereby causing the filing of employee grievances . . . . Based on the evidence in this record I agree with Complainant's contention that Respondent Carnation has the flexibility, within its collective bargaining agreement with the necessary party local (649) to place Complainant in the Labeler's position and allow him to observe his Sabbath . . . The possibility of adverse employee reaction is not a statutory exception that Respondent can rely upon as justification for its failure to comply with the Human Rights Law. (App. C, pp. 52 and 53).

It is respectfully submitted that in light of the clarification of federal law contained in *Hardison*, a New York State court is preempted by federal law from rendering a judgment in their case which might interfere with the valid and binding collective bargaining agreement in force between Carnation and the union.

The opinion in the *Hardison* case emphasized that an otherwise valid collective bargaining agreement need not be violated by an employer in order to accommodate an employee's religious beliefs. The Court stressed that collective bargaining lies at the core of our national labor policy and that the most explicit legislative direction is required in order for any court to embark on a course which might tend to undermine the role of the collective bargaining agreement, the recognized keystone of industrial peace.

The Constitution of the United States, Article VI, Clause 2, provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding". It is well settled that any state activity that creates a substantial risk of conflict with policy central to the Federal Labor Law is preempted and barred. *Connell Construction Co. v. Plumbers and Steam Fitters Local Union No. 100*, 421 U.S. 616, 636 (1975).

The opinion of this Court in *Local 24, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283 (1959) [hereinafter "*Oliver*"] is instructive. In that case, the State of Ohio had attempted to enforce its antitrust law against certain common carriers and a local union, so as to enjoin them from carrying out their collective bargaining agreement. This Court held that since the provision found to be offensive under Ohio law was part of an agreement resulting from the exercise of collective bargaining rights under federal labor law, and since that provision was one as to which federal law directed the

parties to bargain, the state could not apply its antitrust law to prevent the parties from carrying out the terms of the agreement. The Court noted that the goal of the federal policy was to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. As the Court stated:

> To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. [Citations omitted]. 358 U.S. at 295-6.

The provisions in a collective bargaining agreement with respect to seniority, rotation of shifts and hours of work are no less mandatory subjects of bargaining than the compensation clause at issue in the *Oliver* case. See also *Trans World Airlines v. Hardison, supra; Oneita Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967). In-

deed, the Court specifically stated in *Hardison* that "allocating the burdens of weekend work was a matter for collective bargaining". 432 U.S. at 80. Clearly, Section 296.10 of the Executive Law cannot be construed to require an employer to discriminate against some employees by mandating weekend work in order to enable others to observe their sabbath. Such a practice would most certainly constitute unequal application of the agreement among employees and would create chaotic personnel problems and lead to grievances and additional arbitrations. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970). It must be emphasized that the issue of grievances or employee unrest is not speculative. Rather, a grievance was filed by Frank Wilson and Blair & Clark served notice in writing that they would no longer work on weekends on which they were entitled to be off.

The opinion of the Court in *Hardison* forms an important addition to the body of law relating to collective bargaining agreements and constitutes a compelling reason for this Court to examine the question of federal preemption as it relates to this Petition.

For the reasons stated above, the Petition should be granted.

III. The Due Process—Review Issue

Under Section 298 of the New York Executive Law, the findings of fact and orders of the NYSDHR "shall be conclusive if supported by sufficient evidence on the record considered as a whole". N.Y. Exec. Law §298 (McKinney, 1982). In affirming the decision of the Commissioner, the New York State Supreme Court, Appellate Division, Fourth Judicial Department was limited to find-

ing that the agency's conclusion was a reasonable one. It had no power "to find new facts or take a different view of the weight of the evidence if the [NYSDHR's] determination [was] supported by substantial evidence". *State Division of Human Rights v. Columbia University*, 39 N.Y.2d 612, 616, 350 N.E.2d 396, 398 (1976), *cert. denied sub nom. Gilinsky v. Columbia University*, 429 U.S. 1096 (1977). Accordingly the appellate court made no finding concerning the merits of the discrimination claim herein, notwithstanding its previous decision of no discrimination, and effectively denied Carnation its right to due process of law. See *State Division of Human Rights v. Carnation*, 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976).

Had the appellate court not been so limited, it would have been clear that there is simply no proof to support the NYSDHR's finding that Carnation violated Section 296.10(a) "by demoting [Clarke] to the lower paying job in August, 1973 and preventing him from continuing in his position as Labeler from that time to the present" (App. C, p. 48). That finding, standing alone, does not justify the inference drawn by the Commissioner that this offer of alternative employment was an act of discrimination. On the contrary, all of the evidence presented at the hearing established that Carnation made every reasonable effort to accommodate Clarke. Indeed, as the uncontradicted testimony of Gary Jordan established, this "lower paying job" was the *only* job available at the time which did not require working on Clarke's sabbath and was offered to Clarke only after all other efforts to keep him in the higher paying job failed (which had been successful for more than two years).

Moreover, the Commissioner's other findings conclusively establish that Carnation resolved a union grievance by Frank Wilson that he was being denied his Saturdays and Sundays off because Clarke would not work on his sabbath by "using David Weaver . . . to fill in for Mr. Wilson", which allowed Clarke to remain in the Labeler Operator position for almost two years (App. C, pp. 45 and 46). The Commissioner also found that the other two Labeler Operators "informed [Carnation] that they would no longer work on Saturdays in place of Complainant" leaving no qualified substitutes to fill in for Clarke in the Labeler Operator position (App. C, p. 46). The record further establishes that Clarke was moved from the Bracket III general labor job to the Bracket II job of warehouseman. In performing this job, which involved Saturday work, the Commissioner found that Carnation had obtained a substitute. "Carnation has, since September 16, 1976, been substituting another person to work in Complainant's place on those Saturdays when he would, normally under the rotating system, have been scheduled to work." (App. C, p. 48). Therefore, it is submitted that the Commissioner in his very own decision has found that Carnation accommodated Clarke in his employment and in carrying out his religious convictions.

Accordingly, it is respectfully requested that the writ be granted because in applying the substantial evidence test, the Court below has denied Carnation its right to due process by denying it a review on the merits of the claim. See *Kremer v. Chemical Construction Corp.*, 72 L.Ed.2d 262 (1982) (dissenting opinion). Had the court below reviewed the record as a whole and the reasonable, probative and logical evidence contained therein, it would have been clear that there is no substantial evidence, let

alone any evidence that Carnation discriminated against Clarke in violation of Section 296.10(a) of the Executive Law. Rather, it would have found that Carnation's acts of accommodation far exceeded the level of reasonable accommodation set forth in *Trans World Airlines, Inc. v. Hardison, supra.* See also *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982).

Conclusion

For all of the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, July, 1976.

43 STATE DIVISION OF HUMAN RIGHTS, Respondent, v CARNATION et al., Petitioners.—Determination unanimously annulled, without costs, and determination of Division of Human Rights confirmed. Memorandum: This appeal presents a question, which in recent years has generated a spate of lawsuits, particularly in the Federal courts, relating to the right of an employee to demand that his employer grant him time off for religious observances. In large measure, determinations in this area turn on particular fact situations. Complainant-respondent Daryl Clarke in September, 1971, more than four years after he began his employment with petitioner Carnation Company (employer), converted to the religion of Seventh Day Adventist. He informed his employer that because of his religious beliefs he would not work on Saturdays. The employer took steps to accommodate him by switching days off in a manner not in keeping with the normal established plant operation. Despite problems with other employees because of the method of accommodation the employer permitted complainant to arrange with two other employees to work on Saturdays in complainant's place. In July, 1973 the employer was informed by the local union that the two employees did not desire to and would no longer work Saturdays for complainant. The employer offered another job which would not require complainant to work on Saturdays, but which paid less than he had been earning. Employer advised complainant that by transferring to the general labor classification he would suffer no loss of seniority rights

or other fringe benefits with exception of the reduction in pay. The new job would pay $3.13 per hour rather than $3.63 which complainant was earning. Complainant accepted the new job classification but filed a complaint with the State Division of Human Rights, claiming that the employer had unlawfully discriminated against him by reason of his religion. An investigation was made by the division which determined that it found no probable cause to believe that the employer was engaging in the unlawful practice complained of and it dismissed the complaint. Complainant appealed the dismissal order to the State Appeal Board. The board found that the division's order of dismissal was "arbitrary, capricious and an unwarranted exercise of discretion" and it reversed and vacated the division's order. The board further held "that there is probable cause to believe that the respondents have engaged in the unlawful discriminatory practice complained of" and remanded the matter to the division for further proceedings. Section 296 (subd 10, par [a]) of the Executive Law provides: "It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion." The record establishes that the employer did not violate the provisions of paragraph [a] of subdivision 10. There is substantial evidence that the employer made every reasonable effort to accommodate complainant and to allow him to continue in his employment. The division properly determined that the employer did nothing "to prohibit, prevent or disqualify [complainant] or otherwise

to discriminate against [him] in obtaining or holding employment, because of his observance *** of his religion". He was permitted to continue in employment and has been continuously employed. The finding of the division of no probable cause was supported by substantial evidence and cannot be characterized as "arbitrary and capricious" (*Matter of Holland v Edwards*, 307 NY 38, 44). The Executive Law properly obliges employers to make reasonable accommodations to meet the religious needs of their employees. Such accommodations should not work an undue hardship which would jeopardize the financial existence of the employer. The employer here is dealing with a product of extremely perishable nature. Production schedules must be rigidly adhered to in processing milk. Notwithstanding this fact, the employer made every effort to co-operate with the complainant and did so until circumstances prevented it from continuing the work schedules which had existed for two years. Admittedly, complainant has suffered a reduction of 50 cents per hour in his wages. Regretable as this is, the employer suggests that this is the economic sacrifice complainant, if he is to remain in his present employment, must make in exercising his religious beliefs. There is no evidence in this record that the employer's "decision was in fact actuated by discrimination against creed" (*Matter of Eastern Greyhound Lines Div. of Greyhound Lines v New York State Div. of Human Rights*, 27 NY2d 279, 283). On the record before us the division properly determined the matter and its determination should be confirmed. (Proceeding pursuant to Executive Law, §298.) Present—Marsh, P.J., Moule, Simons, Goldman and Witmer, JJ.

APPENDIX B

Memorandum Decision of State of New York, Court of Appeals.

STATE DIVISION OF HUMAN RIGHTS, Appellant v CARNATION COMPANY et al., Respondents

Argued May 2, 1977; decided June 7, 1977

Civil rights—discrimination because of religious beliefs.

State Div. of Human Rights v Carnation Co., 53 AD2d 1053, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered July 12, 1976 in a proceeding pursuant to section 298 of the Executive Law, which (1) annulled an order of the State Human Rights Appeal Board (a) reversing an order of the State Division of Human Rights which dismissed a complaint charging respondents with an unlawful discriminatory practice, and (b) finding that there was probable cause to believe respondents engaged in unlawful discriminatory practices, and (2) reinstated the order of the State Division of Human Rights. Complainant was employed as a labeler operator for respondent Carnation Company. Shortly after being promoted to that position complainant was baptized into the Seventh Day Adventist Church and informed his employer that because of his religious beliefs he would not be able to work Saturdays. Thereafter the employer attempted to switch complainant's days off in order to accommodate his religious beliefs but discontinued that practice when a grievance was filed by a fellow employee of complainant. The employer then permitted complainant to arrange a schedule with other labeler operators whereby

they worked on the Saturdays complainant would ordinarily work. This arrangement continued from September of 1971 until July of 1973, when the local union informed the employer that the other employees would no longer substitute for complainant. The employer then transferred complainant to a lower paying job classification, which complainant accepted under protest, and he then filed a complaint with the State Division of Human Rights. The State Human Rights Appeal Board found that the State Division of Human Rights' dismissal of the complaint was arbitrary, capricious and an unwarranted exercise of discretion. The Appellate Division concluded that the division's decision was supported by substantial evidence and was not arbitrary and capricious.

Alan J. Saks and *Beverly Gross* for State Division of Human Rights, appellant.

A. Terry Van Houten, Warren L. Johns, Walter E. Carson and *James A. Spitz, Jr.*, for Daryl Clarke, appellant.

H. Kenneth Schroeder, Jr., for respondents.

MEMORANDUM. Order of the Appellate Division reversed, order of the Human Rights Appeal Board reinstated, and the case remitted to the Division of Human Rights for an evidentiary hearing. Section 296 (subd 10, par [a]) of the Executive Law prohibits discrimination in employment based on a person's "observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion". The statutory pro-

hibition does not apply, however, "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer" (Executive Law, §296, subd 10, par [c]).

The record in this case is not sufficiently developed to determine, as a matter of law, whether retaining complainant in his former position would have resulted in undue economic hardship to the employer. If, as the employer contends, designating a qualified substitute for complainant's Saturday shift would entail any significant increase in costs, that would be enough to establish undue hardship. It should be obvious that an undue economic hardship does not require any threat or undermining of the economic stability of an enterprise. It would be enough that a palpable increase in costs or risk to industrial peace would be required in order to accomplish the end sought by the employee. But, without an evidentiary hearing, it cannot be determined definitively whether the employer could have accommodated appellant's schedule without such significant cost or risk.

Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur; Judge JASEN dissents and votes to affirm on the memorandum at the Appellate Division (53 AD2d 1053).

Order reversed, with costs, order of the Human Rights Appeal Board reinstated, and the case remitted to the Appellate Division, Fourth Department, with directions to remand to the Division of Human Rights for further proceedings in accordance with the memorandum herein.

APPENDIX C

Decision of the Commissioner of the New York State Division of Human Rights.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
DARYL CLARKE,

Complainant.

- against -

CARNATION COMPANY AND SUPERINTENDENT, GARY JORDAN,

Respondents.

- and -

TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 649,

Necessary Party.

Case No.(s) CRF-31614-73

NOTICE OF ORDER AFTER HEARING

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Rose Ferrandina, Esq. In accordance with the Division's Rules of Practice, copies of this Order have

been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047, and at 69 Delaware Avenue, Buffalo, New York 14202. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to this proceeding may appeal this Order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this Order. The notice of appeal must be filed by mail or in person at the office of the State Human Rights Appeal Board, Room 8234, 2 World Trade Center, New York, New York 10047. DO NOT FILE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board.

DATED: JUN 18 19(illegible)

NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

WERNER H. KRAMARSKY
COMMISSIONER

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

TO:

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Carnation Company
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Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

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State Division of Human Rights
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Hon. Robert Abrams
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Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
DARYL CLARKE,

Complainant,

- against -

CARNATION COMPANY AND SUPERINTENDENT, GARY JORDAN,

Respondents,

- and -

TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 649,

Necessary Party.

Case No.(s) CRF-31614-73

PROCEEDINGS IN THE CASE

On the 16th day of October, 1973, the above-named Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with unlawful discriminatory practices relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

On October 25, 1974, a determination was issued by the Division which found that "there is no probable cause to believe that the respondents engaged in or was engaging in the unlawful discriminatory practice complained of."

On Complainant's appeal, the State Human Rights Appeal Board on June 30, 1975 reversed the aforesaid determination and found that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice and remanded the case to the Division for a public hearing on the complaint.

The decision and order of the Board were appealed by Respondents to the Appellate Division of the Supreme Court, Fourth Department, and by order dated July 12, 1976, the Appellate Division reversed the Board's decision and thereby ordered the original determination of "no probable cause" reinstated and the complaint dismissed. *State Division of Human Rights v. Carnation Company*, 53 A.D.2d 1053.

An appeal of the Appellate Division's decision was taken and the Court of Appeals, in a Memorandum Decision dated June 7, 1977, reversed the order of the Appellate Division, reinstated the order of the State Human Rights Appeal Board and remitted the case to the Appellate Division, with directions to remand to the Division of Human Rights for further proceedings in accordance with the memorandum, 42 N.Y.2d 873.

Thereupon, after investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondents had engaged

in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for a hearing before Rose M. Ferrandina, Esq., an Administrative Law Judge of the Division. The hearing was held on February 15, April 6, April 7, May 18, June 22 and October 19, 1978.

Complainant appeared at the hearing and was represented by Harris, Beach, Wilcox, Rubin & Levey, Esqs., by Terry Van Houten, Esq., and James Spitz, Jr., Esq., of Counsel. Respondents appeared and were represented by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs., by Kenneth Schroeder, Jr., Esq., of Counsel.

The Division was represented by Ann Thacher Anderson, Esq., General Counsel, by Elaine Berger, Esq., of Counsel. Truck Drivers and Helpers Union, Local No. 649, which was joined as a necessary party by the Administrative Law Judge on motion of Divison's counsel, appeared by James Crotty, Esq.

The transcript of the final hearing was received on November 13, 1978. Complainant's post hearing brief was received on January 4, 1979, and Respondents' was received on January 10, 1979.

FINDINGS OF FACT

1. Complainant Daryl Clark began his employment with Respondent Carnation Company (hereinafter "Carnation") on or about April 7, 1967 at Carnation's South Dayton plant. Carnation is engaged in the business of canning of evaporated milk, and the South Dayton location is the only one of its seven plants located in New York State.

2. On or about September 25, 1971, Complainant became a member of the Seventh Day Adventist Church, and from that date to the present, he has observed the period from sundown Friday to sundown Saturday as the Sabbath, in accordance with the tenets of his religion.

3. After his conversion to the Seventh-Day Adventist religion, Complainant, who held the position of Labeler Operator, Bracket I, (there were three such positions in the plant), informed his supervisors Mr. Bill Cook and Mr. Robert Killroch that he could no longer work on his Sabbath, but that he would be available for work on any other day, including Sunday.

4. The canning production process at South Dayton is a continuous "line" operation which runs, as a general rule, on Monday, Tuesday, Thursday, Friday and Saturday. Functions, such as maintenance of equipment, are performed at the plant on Wednesdays and Sundays. Carnation at present employs approximately twenty-one hourly employees in its canning operation, covering two shifts. Hourly employees such as Complainant, at all times herein pertinent, were covered by collective bargaining agreements between Carnation and Truck Drivers and Helpers Union, Local Union No. 649, named as a Necessary Party in this case (hereinafter "Local 649").

5. The collective bargaining agreements in question contain the following language: "The normal work week will be forty (40) hours in five (5) days, Monday through Sunday." "So far as possible relief days shall be rotated. Employees shall receive two (2) days off each week ex-

cept in unavoidable emergencies." The rotation of relief days in accomplished according to the employees' shift in a given week. There are two shifts and the prevailing work practice is that an employee who is assigned to the early shift in a given week, shall have Saturday and Sundays off. Employees switch shifts on a weekly basis and shift selection and rotation of relief days are not governed by seniority.

6. After Complainant informed his supervisors that he would no longer work on his Sabbath, the other two Labeler Operators, Mike Blair and David Clark, "covered" for Complainant on a temporary basis on Saturdays, that is they worked in Complainant's place when Complainant was scheduled to work on his Sabbath.

7. On or about November 27, 1971, Frank Willson, a Can Forker—Boxer Operator, Bracket II, filed a union "grievance" in which he complained that he was being denied his Saturday and Sunday off in a week when he worked the "early" shift and Complainant worked the "late" shift. I accept the testimony of Respondent Gary Jordan, who became Superintendent of the Dayton Plant in or about September, 1973, that at the time in question, Complainant would normally fill in for the Boxer Operator (in this case Mr. Willson). Since Complainant was not working on his Sabbath, Mr. Willson was not receiving his Saturday off on the rotating basis described in paragraph five of this Order. The grievance was resolved by the Respondents by using David Weaver, another Can Forker—Boxer Operator, to fill in for Mr. Willson. No other employees, including a third Boxer

Operator whose schedule was also affected by Complainant's not working on Saturday, filed any union grievances.

8. Shortly after the Willson grievance was so resolved, Complainant entered into a voluntary arrangement with the other two Labeler Operators in which they agreed that they would work in Complainant's place as Labelers when Complainant was scheduled to work on his Sabbath. This arrangement continued until July, 1973, when the two Labeler Operators informed Respondent they would no longer work on Saturdays in place of Complainant.

9. By letter dated July 5, 1973, Carnation, by its superintendent J. W. Cooke, stated to Complainant three alternative ways by which Carnation could arrange for Complainant to observe his Sabbath:

> (1) put Complainant into a Bracket III general labor position (this would involve a 50 cents per hour decrease in pay) or
>
> (2) terminate his employment.
>
> (3) create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity on Saturdays only and a lower bracket job the remaining four days of the week.

Carnation indicated in this letter it would not undertake alternative 3 as "it is not economical to pay an employee for 40 hours per week at Bracket I pay and only receive 8 hours Bracket I work." The collective bargaining agreements previously referred to provide "[i]f an employee spends over fifty percent (50%) of his time on a

higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job."

10. Complainant was scheduled by Carnation to work as a Labeler on Saturday, July 7, 1973. After Complainant absented himself from work on that day, in order to observe his Sabbath, he was notified by Respondent by letter dated July 9, 1973, that he faced disciplinary action, "including the possibility of termination." Complainant was directed "to report to work as scheduled unless a reasonable excuse was given to your supervisor in advance of your absence."

11. Shortly thereafter, Complainant communicated with Frank Harvey, Business Representative for Local 649, concerning the alternatives posed by Carnation in its letter of July 5, 1973. Mr. Harvey, by letter dated July 17, 1973 advised Complainant that "to me number two or three seem to be the best solution *** my advice to you is to choose one of the three alternatives proposed by the Company."

12. On or about August 3, 1973, Complainant again advised Respondents that he would not work as a Labeler on Saturday, August 4, 1973 as scheduled, or any other Saturday. Shortly thereafter, Complainant, perceiving that he would be dismissed from the Labeler's position if he did not report on August 4th, accepted, under protest, a demotion from the Labeler's position to a position of General Laborer, Bracket III, which paid 50 cents per hour less. The laborer's position, which involved janitorial duties, was a Monday to Friday job which did not require Saturday work.

13. Complainant remained in the position of laborer until about September, 1976, when he bid for and was awarded a position of Warehouseman, a Bracket II position paying an hourly rate of 25 cents an hour less than the Bracket I Labeler Operator. Complainant has remained in the Warehouseman's position from that time to the present. There are three employees in the Warehouseman's position and they are normally scheduled for Saturday work in accordance with the same contractual rotation schedule governing Labeler Operators. Carnation has, since September 15, 1976, been substituting another person to work in Complainant's place on those Saturdays when he would, normally under the rotating system, have been scheduled to work. There is no evidence that any employee affected thereby has filed a grievance alleging violation of the bargaining agreement.

14. In September, 1977, Complainant was offered that position by Respondents on the condition that he work on Saturday, when scheduled, an offer which Complainant declined.

15. From August, 1978 and up to and including the last hearing date of October 19, 1978, the South Dayton plant operated with only two Labeler Operator positions filled. During this three month period, Respondent has used "relief operators" to work in place of both Labeler Operators on a Saturday. No employee has filed a grievance alleging this constituted a breach of the collective bargaining agreement.

16. The South Dayton plant projects the number of hours that a Labeler Operator will be working one year

in advance. Rarely do variations have to be made in those projections. Respondents may use other employees, not necessarily those denominated as "relief men," to replace Labelers as long as those individuals are qualified for this position, which requires approximately two to three weeks of training.

17. Complainant is the only employee at the South Dayton Plant who is a Sabbath Observer.

OPINION

1. The Human Rights Law Section 296.10 is a legislative reaffirmation of the right of every person in this State to obtain and hold employment free from discrimination because of his religion and, in accordance with this policy, no individual can be prohibited, prevented or disqualified from, or discriminated against in obtaining or holding employment because of the observance of his Sabbath or other holy days in accordance with his religion. It was the intention of the legislature that this act "be construed liberally to effectuate the purposes for which it was enacted." (Laws of 1967, Chapter 667, Section 1).

2. Paragraph (a) of Section 296.10 contains a broad and seemingly absolute prohibition against discrimination in employment because of an employee's, or potential employee's observance of any particular day as his Sabbath.

3. Under paragraphs (b) and (c) of Section 296.10, an employer is not required to accommodate an employee in cases of emergency or where that person's presence is in-

dispensable to the orderly transaction of business; or if that person holds a position dealing with health or safety and that person must be available whenever needed; or if the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer.

4. Respondents contend they have not violated Section 296.10 because Complainant, although demoted to a lower paying job, has been continuously employed by Respondents. I find that such an interpretation of the statute would permit the economic coercion and hardship upon Sabbath observers that the enactment of Section 296.10 was enacted to prevent.

5. Respondent Carnation's actions in August, 1973, as a result of which Complainant was faced with the prospect of being terminated from his position as a Labeler unless he agreed to work on his Sabbath, left Complainant with no alternative other than to accept the lesser job of Laborer, which he did under protest.

6. I find that Respondent Carnation violated Section 296.10(a) by demoting Complainant to the lower paying job in August, 1973 and preventing him from continuing in his position as Labeler from that time to the present. However, since Respondent Gary Jordan did not become superintendent until September, 1973, he is in no way responsible for such violation.

7. Respondents further contend that Complainant is not entitled to the protection of Section 296.10 (a) because to retain Complainant in his former position would have resulted in undue economic hardship to the employer as provided for in Section 296.10 (c).

8. In the prior proceeding wherein the New York Court of Appeals directed that this matter be remanded to the Division, the Court in its memorandum decision held:

> "The record in this case is not sufficiently developed to determine, as a matter of law, whether retaining complainant in his former position would have resulted in undue economic hardship to the employer. If, as the employer contends, designating a qualified substitute for complainant's Saturday shift would entail any significant increase in costs, that would be enough to establish undue hardship. It should be obvious that an undue economic hardship does not require any threat or undermining of the economic stability of an enterprise. It would be enough that a palpable increase in costs or risk to industrial peace would be required in order to accomplish the end sought by the employee. But without an evidentiary hearing, it cannot be determined definitely whether the employer could have accommodated appellant's schedule without such significant cost or risk." (State Division of Human Rights v. Carnation Co., 42 N.Y.2d 873 (1977)).

9. In the instant proceedings Carnation presented as its sole witness, Respondent Gary Jordan, the Dayton plant Superintendent since September, 1973. Although it is Mr. Jordan's opinion that placing Complainant in the position of Labeler Operator and allowing him to observe his Sabbath would have a noticeable adverse effect on Carnation's costs, and although Respondents offered in evidence a series of blank forms (Respondent's Exhibits J1 through J17) to show that Carnation keeps detailed and comprehensive records which measure costs, no ac-

tual cost data as to the possible methods of employing Complainant while allowing him to observe his Sabbath was presented by Respondents.

10. Respondents argue that if they were required to use lesser classified employees to fill in for Complainant on his Sabbath, such employees would, under the prevailing collective bargaining agreements, be entitled to be paid the prevailing wage of the higher classified Labeler position, thereby causing an increase in labor costs.

11. The provision in question provides, "if an employee spends over fifty percent (50%) of his time on a higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job."

12. No attempt was made by Respondents to show, and it is inconceivable to me, that accommodating Complainant on his Sabbath by substituting a lesser classified employee in his place, would involve a substitution for thirty *consecutive* work days. This argument is further belied by the fact that Respondents have been able to substitute other employees, including those of a lower classified pay grade, for Complainant in his position as Warehouseman when his schedule requires Saturday work, without apparently violating the collective bargaining agreement.

13. Respondents further contend that to grant Complainant the relief he seeks would cause a significant risk to industrial peace, since the bargaining agreements, as relating to rotation of relief days, (as cited in finding 5 of

this order) would be violated thereby causing the filing of employee grievances. This conclusion is belied by the evidence presented. As outlined in finding 13 of this order, Complainant as a Warehouseman, has, since October, 1976, been allowed to observe his Sabbath, without any such repercussions. Based on the evidence in this record I agree with Complainant's contention that Respondent Carnation has the flexibility, within its collective bargaining agreement with the necessary party local 649, to place Complainant in the Labeler's position and allow him to observe his Sabbath.

14. The hearsay statements from Labeler Operator, and reliefmen employed at the plant in 1978, in evidence as Respondents' exhibit K, are not probative of whether those employees might voluntarily work for Complainant on an occasional basis in the position of Labeler Operator on his Sabbath, since the supervisor who obtained these statements was not called as a witness, nor was Mr. Jordan present when they were secured and he testified he had no knowledge as to what conversation occurred between these employees and the supervisor who obtained them. The possibility of adverse employee reaction is not a statutory exception that Respondent can rely upon as justification for its failure to comply with the Human Rights Law.

15. Respondents argue that the United States Supreme Court's decision in the matter of *Hardison v. Trans World Airlines*, 432 U.S. 63 1977) concerning Sabbath observance is controlling upon this proceeding. I do not agree. It would appear that the *Hardison* decision was decided under Title VII of the federal Civil Rights

Act of 1964, (42 U.S.C. Section 2000 e *et seq.*), a general statute without specific reference to Sabbath observance. That statute also insulates, by specific provision, bona fide seniority rights created by collective bargaining agreements, and such seniority rights were a factor in the *Hardison* case, (42 U.S.C. Section 2000 e-2(h)). The New York law contains no such insulating provision. Moreover, in the instant proceeding it would appear that seniority rights are not involved; Complainant's seniority as compared to other employees was never presented as an issue.

16. I find that Complainant's personal presence on his Sabbath was not required for emergencies nor indispensable to the orderly transaction of Respondent Carnation's business.

17. I further find that Respondent Carnation did not sustain the burden of proof required by Section 296.10(c) to show that "the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer."

18. Respondent Carnation could have scheduled Complainant to work on days and times so as to permit him to work as a Labeler Operator and observe his Sabbath.

DECISION

On the basis of the foregoing, I find that Respondent Carnation, but not Respondent Jordan, discriminated against Complainant in violation of the Human Rights Law by requiring him to accept a demotion so that he could observe his Sabbath.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

Based upon the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against Respondent Gary Jordan be, and the same is hereby dismissed; and it is further

ORDERED, that the Respondent Carnation, its agents, representatives, employees, successors and assigns shall cease and desist from prohibiting, preventing or disqualifying Complainant or any other person from, or otherwise discriminating against Complainant or any person in, obtaining or holding employment in the terms, conditions and privileges of employment, because of their observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of their religion; and it is further

ORDERED, that the Respondent Carnation, its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent Carnation shall forthwith offer Complainant a position as a Labeler Operator permitting Complainant to work on days and shifts which would not

require him to be present on his Sabbath or other holy days. Complainant shall be allowed ten (10) business days in which to accept or reject the said offer.

2. Respondent Carnation shall, within thirty (30) days from the date hereof, pay to Complainant as back pay, a sum of money based on the difference between what Complainant would have earned as a Labeler Operator from August 4, 1973 to the date Complainant either accepts or rejects the offer of employment, less withholding and usual deductions, and the sums actually earned by Complainant during this period. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from August 4, 1973 to the date that the Complainant accepts or rejects the Respondent Carnation's offer. Respondent Carnation shall furnish proof of payment within ten (10) business days thereof to the State Division of Human Righs, Attention Ann Thacher Anderson, Esq., General Counsel, 2 World Trade Center, New York, New York 10047.

3. Respondent Carnation shall grant Complainant all the rights, privileges, benefits, seniority and pay raises he would have received or been entitled to receive had he not been demoted on August 4, 1973.

4. Respondent Carnation shall instruct in writing all of its appointing personnel, supervisory employees, officers, agents and Local 649 that no person may be barred from employment and that no retaliatory action may

be taken against any employee who refuses to work on his Sabbath or other holy days in accordance with the requirements of his religion.

5. Respondent Carnation shall make available to the duly-authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: JUN 18 1979
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS
WERNER H. KRAMARSKY
COMMISSIONER

APPENDIX D

Order of the New York State Human Rights Appeal Board.

NOTICE OF ORDER

STATE OF NEW YORK
Executive Department

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center—25th Floor
New York, N.Y. 10047
Tel: 488-2038 (area code 212)

To:
All Parties to this Proceeding—APPEAL NO. 5881

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Attachment:

Appendix D—Order of the New York State Human Rights Appeal Board.

ORDER

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS
on the complaint of DARYL CLARKE,
Complainant-Respondent,

vs.

CARNATION COMPANY,
Respondent-Appellant,

and

GARY JORDAN,
Respondent-Appellant,

and

TRUCK DRIVERS AND HELPERS UNION
LOCAL NO. 649,
Necessary Party.

Case No. CRF-31614-73.
Appeal No. 5881.
Argued: Sept. 19, 1979.

PRESIDING: Honorable Richard Wong.

Appearances:

H. Kenneth Schroeder, Jr., Esq. on behalf of Respondent-Appellant.

James A. Spitz, Jr., Esq. on behalf of Complainant-Respondent.

E. Joseph Giroux, Jr., Esq., on behalf of Necessary Party.

Appendix D—Order of the New York State Human Rights Appeal Board.

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *300 Gramatan Avenue Associates* v. *State Division of Human Rights*, 45 N.Y.2d 176, and

A majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS
APPEAL BOARD
By IRMA VIDAL SANTAELLA
Irma Vidal Santaella
Chairman

Dated and Mailed: February 18, 1981.
TO: (See list attached)

Appendix D—Order of the New York State Human Rights Appeal Board.

STATE HUMAN RIGHTS APPEAL BOARD
APPEAL NO. 5881

DISTRIBUTION LIST

RESPONDENT-APPELLANT

Carnation Company
First Avenue
South Dayton, New York 14138

Att: Mr. Gary Jordan,
Superintendent

Carnation Company
5045 Wilshire Boulevard
Los Angeles, California 90036

Att: Mr. Henry Snapper,
Supervisor Corporate Labor Relations

Truck Drivers and Helpers
Union Local #649
102 East Main Street
Falconer, New York

Hodgson, Russ, Andrews,
Woods & Goodyear, Esqs.
1800 One M & T Plaza
Buffalo, New York 14203

Att: H. Kenneth Schroeder, Jr., Esq.

James E. Crotty, Esq.
1106 Chemical Bank Building
Buffalo, New York 14202

Appendix D—Order of the New York State Human Rights Appeal Board.

COMPLAINANT-RESPONDENT

Mr. Daryl Clarke
R.D. #2, Dye Road, Box 130
South Dayton, New York 14138

Harris, Beach, Wilcox,
Rubin & Levey, Esqs.
2 State Street
Rochester, New York 14614
Att: A. Terry Van Houten, Esq.

James A. Spitz, Jr., Esq.

NECESSARY PARTY

E. Joseph Giroux, Jr., Esq.
McMahon & Crotty
1028 Liberty Bank Bldg.
Buffalo, N.Y. 14202

DOHR

Commissioner Werner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel
STATE DIVISION OF HUMAN RIGHTS
2 World Trade Center
New York, N.Y. 10047
ATT: Elaine Berger, Esq.

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, N.Y. 10047

APPENDIX E

Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

44 STATE DIVISION OF HUMAN RIGHTS, on Complaint of DARYL CLARKE, Petitioner-Respondent, v CARNATION COMPANY, Respondent-Petitioner.—Order of enforcement unanimously granted and cross petition dismissed, without costs. Memorandum: The Court of Appeals, on a previous appeal, remitted this matter for a hearing to determine whether retaining complainant in his position, while permitting him to observe his Sabbath, would result in undue economic hardship to the employer (*State Div. of Human Rights v Carnation Co.*, 42 NY2d 873). On remission to the State Division of Human Rights, the respondent Carnation Company submitted no cost analysis to support its plant foreman's opinion that accommodating the employee would have a "noticeable effect" on Carnation's costs. The commissioner found that Carnation Company "did not sustain the burden of proof required by section 296.10(c) [of the Executive Law] to show that the 'uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer' " and that the relief complainant seeks would not cause a significant risk to industrial peace. On a review of the entire record, we determine that "there is a rational basis in it for the findings of fact supporting the agency's decision" (McCormick, Evidence [2d ed], §352, p 847, quoted in *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176, 182; see *State Div. of Human Rights v Genesee Hosp.*, 68 AD2d 692, 703, revd *sub nom. Matter of Genesee Hosp. v State Div. of Human Rights*, 50 NY2d 917, on dissenting opn) and therefore, we sustain the orders of the agency and grant an order of enforcement. (Proceeding pursuant to Executive Law, §298.) Present—Hancock, Jr., J. P., Callahan, Denman, Boomer and Moule, JJ.

APPENDIX F

Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, *J.P.*, CALLAHAN, DENMAN, BOOMER, MOULE, *JJ.*

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of DARYL CLARKE,
Petitioner-Respondent,

v.

CARNATION COMPANY,
Respondent-Petitioner.

This proceeding having duly come on to be heard before this court pursuant to Executive Law, §298, wherein petitioner, State Division of Human Rights, seeks an order enforcing its order dated June 18, 1979 and complainant Daryl Clarke having joined in said application, and the respondent, Carnation Company, by cross-petition requests that the determination and orders of the State Division of Human Rights and the Appeal Board be annulled and for other relief,

Now, upon reading and filing the petition of the State Division of Human Rights verified by Elaine Berger on June 3, 1981, the record on review, the notice of motion with proof of service thereof, the answer of complainant,

Appendix F—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

Daryl Clarke, dated June 16, 1981, and the answer and cross-petition of respondent, Carnation Company, sworn to June 8, 1981, and the matter having been submitted by Elaine Berger of counsel for the petitioner, State Division of Human Rights, argued by James Spitz of counsel for complainant, Clarke, and Anne Simet of counsel for respondent, Carnation Company and due deliberation having been had thereon,

It is hereby ORDERED, That the petition for an order of enforcement be and the same hereby is unanimously granted, and the order of the State Division of Human Rights dated June 18, 1979 is hereby made the order of this court and the Carnation Company is hereby directed to comply therewith and the cross-petition is dismissed, without costs.

Memorandum, which is hereby made a part hereof.

Entered: February 26, 1982.

MARY F. ZOLLER, *Clerk*.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this FEB 26 1982.

MARY F. ZOLLER
(Seal) *Clerk.*

APPENDIX G

Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, Denying Leave to Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE
OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, *J.P.*, CALLAHAN,
DENMAN, BOOMER, MOULE, *JJ.*

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of DARYL CLARKE,
Petitioner-Respondent,

v.

CARNATION COMPANY,
Respondent-Petitioner.

The above named Carnation Company having duly moved before this Court for an order granting leave to appeal to the Court of Appeals from the order of this Court, entered February 26, 1982

Now, after reading and filing the affidavit of H. Kenneth Schroeder, Jr. sworn to March 29, 1982, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, the opposing affidavit of James A. Spitz, Jr. sworn to April 12, 1982 and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be and the same hereby is denied.

Entered: MAY 14 1982
MARY F. ZOLLER, *Clerk.*

Appendix G—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, Denying Leave to Appeal to the Court of Appeals.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this MAY 14 1982.

MARY F. ZOLLER
(Seal) *Clerk*

APPENDIX H

Order of State of New York, Court of Appeals, Denying Leave to Appeal.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A.D. 1982.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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4 Mo. No. 662

STATE DIVISION OF HUMAN RIGHTS
on the complaint of DARYL CLARKE,
Respondent,

vs.

CARNATION COMPANY,
Appellant.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX I

Statutory Provisions.

EXECUTIVE LAW 296.10(a)(b)(c)

10. (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.

(b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he oberves as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such

that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties with respect to any applicant therefor or holder thereof who, as a requirement of his religion, observes such day or days or portion thereof as his sabbath or other holy day. In the case of any employer other than the state, any of its political subdivision or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1002

IN THE

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,

Petitioner,

v.

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Department

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-5376

SARA TOLL EAST
Of Counsel

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No. 82-1002

IN THE

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,

Petitioner,

v.

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Department

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Respondent State Division of Human Rights respectfully requests that the petition for a writ of certiorari be denied because:

(1) The Court lacks jurisdiction.

(2) The petition raises no substantial federal question.

Statement of the Case

Petitioner seeks review by this Court of the decision of the Appellate Division of the Supreme Court of the State of New York which confirmed and enforced an order of the State Human Rights Appeal Board affirming an order of the State Division of Human Rights.

The administrative orders sustained by the Appellate Division found that petitioner had violated the Human Rights Law, Executive Law § 296.10 (McKinney 1982), by demoting complainant Daryl Clarke, a Seventh-day Adventist, to a lower paying job because he would not work on his Sabbath.*

At the Division's hearing, petitioner did not submit any cost data to support its position that accommodating complainant in his former position would have resulted in a significant increase in cost. The Division found that petitioner had failed to demonstrate undue economic hardship, as required by Section 296.10(c) of the Human Rights Law. The Appellate Division found on a review of the entire record, that it supported the Division's order. *State Division of Human Rights* v. *Carnation Co.*, 86 A.D.2d 977 (4th Dept. 1982).

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* The Court of Appeals on a previous appeal had remanded the matter to the Division for a hearing to determine whether retaining complainant in his former position and permitting him to observe his Sabbath would have resulted in undue economic hardship. *State Div. of Human Rights* v. *Carnation Co.*, 42 N.Y.2d 873 (1977).

At the Appellate Division, petitioner did not challenge the constitutionality of the Human Rights Law and did not raise any federal questions.*

After the Appellate Division affirmed the Division's order, petitioner sought and was denied leave to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a). *State Division of Human Rights* v. *Carnation Co.*, 57 N.Y.2d 606 (1982). In its motion for such leave, petitioner did not challenge the validity under the Federal Constitution of the Human Rights Law and did not raise any federal questions.**

---

* The questions raised and briefed by petitioner at the Appellate Division were:

> Question 1: Has the Respondent made reasonable effort within the meaning of section 296.10(a) of the Executive Law to accommodate the Complainant in the practice of his religion?
>
> Question 2: Are the Orders of the Commissioner of the State Division of Human Rights and the State Human Rights Appeal Board supported by substantial evidence?
>
> Question 3: Are the legal premises relied upon by the Commissioner at variance with the law which is applicable to the issues raised at the hearing as set forth by the New York Court of Appeals in *State Division of Human Rights* v. *Carnation Co.*, 42 N.Y.2d 873 (1977), and in further contradiction of the decision of this Court previously issued relative to the matters herein in *State Division of Human Rights* v. *Carnation Co.*, 53 A.D.2d 1053 (4th Dept. 1976)?
>
> Question 4: Has the inordinate administrative delay in processing the complaint and prosecuting the appeal herein in violation of the time limitation set forth in Section 297(2), (4)(a) and(c) and 297-a(4) of the Executive Law substantially prejudiced Respondent as a matter of law thereby divesting the Division and the Appeal Board of jurisdiction to issue the Orders herein?

Petitioner's Appellate Division brief at 1-2.

** The questions presented by petitioner at the Court of Appeals in its brief in support of its motion were:

> *Question I:* Does section 296.10(c) of the Executive Law require an employer to make a good faith effort to accommodate the religious beliefs of a sabbath observer?

(footnote continued on next page)

Petitioner did not invoke N.Y. Civ. Prac. Law § 5601 (b)(1), which provides an appeal as of right where there is directly involved the construction of the Constitution of the United States.

Reasons Why the Writ Should Be Denied

I

The Court Lacks Jurisdiction in This Case

1. The federal constitutional questions raised in the petition were not properly raised, preserved or passed upon in the state courts below.

Petitioner failed to draw into question below the validity of the Human Rights Law on the grounds of repugnance to the Constitution or laws of the United States. Because of this failure, the state courts did not pass upon federal questions.

Question II: Does section 296.10(c) of the Executive Law permit the employer to show undue economic hardship by "a palpable increase in costs or risk to industrial peace"?

Question III: Did the Appellate Division, Fourth Department, misconstrue the mandate of this Court in *State Division of Human Rights* v. *Carnation Co., supra,* when it limited Carnation's review to the issue of increased costs?

Question IV: Was there sufficient evidence in the record to establish discrimination as a matter of law?

Question V: Did the Court below err in requiring that the complainant be reinstated to his former position?

Question VI: Should the Division be divested of jurisdiction for egregious administrative delay in the implementation of the Human Rights Law where the delays far surpass the unusual situation presented in *Board of Education of West Valley* v. *State Division of Human Rights,* 42 N.Y.2d 862 (1977)?

Petitioner's Court of Appeals brief at 2-6.

Petitioner's reference in its Court of Appeals brief to "due process of law"* did not properly raise or preserve a federal question. Petitioner did not cite the Federal Constitution; Article 1 § 6 of the New York State Constitution contains virtually identical due process language. See *Webb* v. *Webb*, 451 U.S. 493 (1981).

Therefore this Court is without jurisdiction in this case. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Wilson* v. *Aiken Industries, Inc.*, 439 U.S. 877 (1978).

2. The Appellate Division was not the highest court in which a decision could be had within the meaning of 28 U.S.C. § 1257(3).

Petitioner failed to invoke N.Y. Civ. Prac. Law § 5601 (b)(1), which provides an appeal as of right to the Court of Appeals where there is directly involved the construction of the Constitution of the United States.**

---

* It is also important to note that for the Court of Appeals to confine Carnation to a hearing devoted to this one issue would have been a denial of due process of law. Under the due process clause, a court cannot deprive a party of a full evidentiary hearing on all of the issues raised by a statute. *Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Co.*, 395 U.S. 337 (1969). By confining the hearing which Carnation received to the issues of increased cost and industrial peace, as the appellate court's mistaken interpretation of the Court of Appeals' decision has done, the decision below has deprived Carnation of due process of law and rendered this statute unconstitutional as applied.

Petitioner's brief at 21-22.

** In addition, by explicitly acknowledging that the Appellate Division's decision was "not appealable as of right under CPLR § 5601" petitioner conceded that no constitutional issue was involved. Petitioner's Court of Appeals brief at 2.

By failing to invoke the mandatory jurisdiction of the Court of Appeals, petitioner failed to exhaust all the possibilities afforded by state procedure for review. See *Gorman* v. *Washington University*, 316 U.S. 98 (1942). The petition therefore must be denied. See *Southern Electric Co.* v. *Stoddard*, 269 U.S. 186 (1925); *North Shore University Hospital* v. *State Human Rights Appeal Board*, —— U.S. ——, 103 S. Ct. 355 (1982).

II

The Petition Raises No Substantial Federal Question

The petition raises four questions. None is an important question of federal law.

First Question: Can the State of New York require more than reasonable accommodation under Section 296.10(c) of the Executive Law?

This is not a federal question. The Court is bound to accept the construction of New York law by the New York Courts. See *Kingsley International Pictures Corp.* v. *Regents of University of New York*, 360 U.S. 684, 688 (1959); *Hortonville Joint School District No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482, 488 (1976).

Second Question: If more than reasonable accommodation is required, does such requirement violate the Establishment Clause of the First Amendment?

This question is without merit because the Human Rights Law has not been construed to require more than reasonable accommodation.

Third Question: Does the First Amendment require a uniform national standard for questions of religious discrimination?

The First Amendment does not provide a basis for striking down the provisions in the Civil Rights Act of 1964 which expressly preserve state anti-discrimination laws and disclaim any intent to pre-empt or exclude them. 42 U.S.C. §§ 2000e-5(b-e), 2000e-7, 2000h-4. See *Kremer* v. *Chemical Construction Corp.*, —— U.S. ——, 72 L.Ed. 2d 262, 275-277 (1982).

Fourth Question: Does federal law pre-empt a state from compelling compliance with a Sabbath observer provision in a manner inconsistent with a collective bargaining agreement?

There can be no determination of this question because there is no evidence that by accommodating complainant the collective bargaining agreement would be violated. Seniority, an issue in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), was not a factor and not an issue in this case (Petitioner's Appendix C at 54, Finding of Fact 15).

The only grievance under the collective bargaining agreement pending at the time of the hearing* was the grievance filed by complainant charging that by refusing to accommodate him, petitioner had violated the non-

* An earlier grievance filed by an employee objecting to filling in for complainant on Saturdays had been voluntarily settled by petitioner in the grievant's favor without resort to arbitration (Transcript at 187-189).

discrimination clause of the contract (Transcript at 143, Respondent's Exhibit F).

Fifth Question: Does the substantial evidence test in Section 298 deny petitioner due process of law?

The Division was acting in a judicial capacity when it resolved issues of fact properly before it upon remand from the Court of Appeals. Petitioner had a full and fair opportunity to argue its version of the facts. The administrative nature of the fact finding did not deprive petitioner of due process of law. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

The Human Rights Law provides for both administrative and judicial review. N.Y. Exec. Law §§ 297-a, 298. This "panoply of procedures" has been characterized by this Court as sufficient under the Due Process Clause. *Kremer* v. *Chemical Construction Corp.*, —— U.S. ——, 72 L.Ed.2d 262, 282 (1982).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1002

In The

Supreme Court of the United States

October Term, 1982

Supreme Court, U.S.
FILED
JAN 15 1983
ALEXANDER L. STEVAS
CLERK

CARNATION COMPANY,

Petitioner,

vs.

STATE DIVISION OF HUMAN RIGHTS on the Complaint of DARYL CLARKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT DARYL CLARKE IN OPPOSITION

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Questions Presented

1. Whether this Court has jurisdiction over the instant petition, because the challenge to the constitutionality of §296.10 of the New York Executive Law and the federal labor law and due process issues alleged in the petition were not presented to the New York courts.

2. Whether the requirement of New York Law that an employer which claims that it cannot reasonably accommodate the religious preferences of an employee without undue economic hardship must submit evidence sufficient to demonstrate such hardship violates the Establishment Clause of the First Amendment of the United States Constitution.

3. Whether the decision by the Commissioner of the New York State Division of Human Rights that the collective bargaining agreement would permit the employer to accommodate the religious preferences of an employee implicates principles of federal labor law.

4. Whether review by the state court to determine whether the agency's findings were supported by substantial evidence in the record of the public hearing accorded the petitioner due process of law.

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In The

Supreme Court of the United States

No. 82-1002

CARNATION COMPANY,

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vs.

STATE DIVISION OF HUMAN RIGHTS on the Complaint of DARYL CLARKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT DARYL CLARKE IN OPPOSITION

STATEMENT OF THE CASE

This petition arises from a dispute between complainant, Daryl Clarke ("Clarke"), and petitioner, Carnation Company ("Carnation") over Clarke's request that Carnation accommodate his observance of his Sabbath in accordance with the tenets of the Seventh Day Adventist Church. At the time of his baptism into that faith on September 25, 1971, Clarke was employed by Carnation at its South Dayton, New York plant as a labeler operator, classified as a Bracket I position. After his conversion, Clarke informed his supervisors that he would no longer work from sundown on

Friday through sundown on Saturday, his Sabbath, but that he would be available to work on Sundays. Carnation produces and cans evaporated milk at the South Dayton plant, and operates the facility on a 7-day per week basis. Maintenance is performed on Wednesdays and Sundays, with production taking place on the remaining days.

Carnation's South Dayton production and maintenance employees, including the labeler operator and warehouseman positions, are represented by the Truck Drivers and Helpers Union Local No. 649 (the "Union"), which has entered into a series of collective bargaining agreements with Carnation. Since 1970, those agreements have contained the following language: "So far as possible, relief days shall be rotated." That rotation, including Saturdays, is accomplished according to the employee's shift in a given week, and is not dependent upon nor related to seniority. It applies to all positions at the plant.

Since 1971, Carnation has had three labeler operators at the plant. It projects the number of hours that each will work a full year in advance, and variations in those projections rarely occur. Carnation may use "relief men" and others to replace labeler operators, so long as those individuals are qualified for the position, which requires approximately two to three weeks of training.

Immediately after Clarke informed Carnation that he would no longer work on his Sabbath, the other two labeler operators "covered" for him on a temporary basis, working those Saturdays on which Clarke was scheduled to work. In November 1971, Frank Wilson, a co-employee, filed a grievance, complaining that he was denied a scheduled Saturday off, because Clarke was not available to substitute for him in accordance with Carnation's customary practice. The grievance was resolved by arranging for another employee to substitute for Wilson, with no determination made

as to whether the practice of accommodating Clarke's religious preference violated the collective bargaining agreement. No other grievances have been filed challenging that practice.

Clarke thereafter arranged with the other labeler operators to substitute for him on a permanent basis. That practice continued until July 1973, when they informed Clarke that they would no longer work in place of him on Saturdays. As a result of that determination by his co-workers, Carnation described to Clarke three alternatives by which he could observe his Sabbath. First, he could be assigned a Bracket III general labor position, with a reduction in pay. Second, he could terminate his employment with Carnation. Third, Carnation could create a fourth labeler operator position for Saturdays only, but it also informed Clarke that it would not agree to that purported alternative.

Carnation did not describe any alternative under which an employee with a lower job classification could be substituted for Clarke on Saturdays. Nor did Carnation describe an alternative which would utilize those employees already denominated as "relief operators" to accommodate Clarke. Pursuant to its collective bargaining agreement with the Union, Carnation could have substituted a lower classified employee without the need to reclassify the substituting employee to the higher paid job. The agreement provides that "if an employee spends over fifty percent (50%) of his time on a higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job." Indeed, Carnation has used lower-grade employees to substitute for Bracket II — Warehouseman without reclassifying the substituting workers, and has used relief operators to substitute for Bracket I — Labeler Operators as well as other Bracket I positions, without

claiming that these practices violate the collective bargaining agreement.

After presenting the three alternatives to Clarke, Carnation did not approach either the Union or Clarke's co-employees concerning alternative ways of allowing him to observe his Sabbath. It did not offer him an alternative whereby he could remain in the position of labeler operator, or in any other Bracket I position, and observe his Sabbath.[1]

Clarke declined the two remaining alternatives offered by Carnation, and was thereafter scheduled to work on Saturday, July 7, 1973. In accordance with the tenets of his religion, he did not report to work on that day. Carnation responded with a letter notifying him that he would face disciplinary action, including termination, if he did not "report to work as scheduled unless a reasonable excuse was given to [his] supervisor in advance of [his] absence."

Carnation again scheduled Clarke to work as a labeler operator on Saturday, August 4, 1973. He advised Carnation that he would not report to work on that day, because it was his Sabbath. Carnation, not considering Sabbath observance to be a reasonable excuse for absence, disciplined Clarke by demoting him to a Bracket III — General Labeler Position, with a $.50 per hour reduction in pay. Clarke accepted that position, under protest, to avoid discharge.

Clarke remained in the general laborer position until September 15, 1976, at which time he bid for, and was placed in, the position of Bracket II — Warehouseman. In that position, he earned $.25 per hour less than he would have earned as a labeler operator. The warehouseman

[1]After completion of the proceeding before the Division, Carnation, in February 1980, placed Clarke in another Bracket I position, which was also in existence in 1973, and has not required him to work on his Sabbath in that position.

position is scheduled for days off in accordance with the same rotation schedule as labeler operators, but Clarke has not been required to work on Saturdays as a warehouseman. Rather, Carnation has substituted other persons to work in his place on those days. No grievance concerning this action has ever been filed, nor has Carnation ever contended that this practice violates the collective bargaining agreement.

In September 1977, Clarke was the most senior employee to bid for a vacant labeler operator position. Carnation offered him the position on the condition that he would work on Saturdays when scheduled. He refused, and was therefore denied the position. For at least three months in 1978, Carnation operated the plant with only two of the three labeler operator positions filled. During that time, the two remaining labeler operators worked in accordance with the normal rotation schedule at the plant, and Carnation used "relief operators" to work in their place on Saturdays. No employee filed a grievance challenging that practice.

Clarke filed the discrimination complaint which is the subject of this petition on October 16, 1973. In an appeal from an initial determination by the New York State Division of Human Rights (the "Division"), the New York Court of Appeals directed that a public hearing be held to determine whether reasonable accommodation of Clarke would cause Carnation undue economic hardship. The decision, based upon the court's interpretation of §296.10 of the New York Executive Law, ordered the hearing to determine whether that accommodation would cause "a palpable increase in costs or risk to industrial peace. . . ." *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873, 875 (1977).

Based upon the evidence adduced at the hearing, the Commissioner of the Division concluded that Carnation had violated §296.10 of the New York Executive Law by requiring Clarke to accept a demotion because he refused to

work on his Sabbath. The Commissioner specifically found that Carnation had failed to present evidence to substantiate its claim that accommodation of Clarke would cause it to incur increased costs. Also, the Commissioner determined that the accommodation of Clarke would not cause Carnation to violate the collective bargaining agreement with the Union, or present a risk to industrial peace. The Human Rights Appeals Board affirmed the Commissioner's decision in an order dated February 18, 1981.

Thereafter, the Division petitioned the Appellate Division of the New York Supreme Court, Fourth Judicial Department to enforce the Commissioner's order. Carnation filed a cross-petition to annul and vacate the order. Specifically, Carnation sought to challenge the factual determination that it had failed to make reasonable efforts to accommodate Clarke. It also urged that the Commissioner's decision was not supported by substantial evidence, the very standard which it seeks to challenge through this petition. Third, it argued that the Commissioner had not complied with the standard set forth by the Court of Appeals in its prior decision in this case. Finally, it argued that it had suffered undue prejudice as a result of administrative delays in the proceedings, and that the Commissioner's order should therefore be vacated.

Carnation did not argue in the Appellate Division that §296.10 of the Executive Law, as interpreted by the Division, violated the Establishment Clause of the First Amendment of the United States Constitution. Nor did it argue that the Commissioner's decision violated any policies of federal labor law. In essence, Carnation's argument in the Appellate Division was a factual one, challenging the conclusions of the Commissioner and the Division.

On February 26, 1982, the Appellate Division unanimously sustained the Commissioner's order, and dismissed Carnation's cross-petition. Carnation sought leave to appeal to the New York Court of Appeals first from the Appellate Division and then from the Court of Appeals. The Appellate Division denied the application on May 14, 1982. The Court of Appeals denied leave to appeal on September 16, 1982.

In its application to the Court of Appeals, Carnation presented arguments concerning its efforts to accommodate Clarke and the applicability of standards established by the New York Court of Appeals to determine undue economic hardship. It also questioned the sufficiency of the evidence to support the Commissioner's decision, and the appropriateness of the remedy of reinstatement. Finally, it raised again the argument that it had been prejudiced through the alleged administrative delay. Significantly, Carnation presented none of the federal constitutional or labor law questions raised in this petition, and did not even cite this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 423 U.S. 63 (1977), upon which it relies so heavily here.

REASONS FOR DENYING THE WRIT

POINT I

THIS COURT LACKS JURISDICTION OVER THE INSTANT PETITION BECAUSE THE ISSUES RAISED THEREIN WERE NEITHER PRESENTED TO, NOR CONSIDERED BY, THE NEW YORK COURT OF APPEALS OR THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT.

It is fundamental that, in cases involving applications for writ of certiorari, this Court has jurisdiction over only those issues which have been presented to the highest state court. *Webb v. Webb,* 451 U.S. 493 (1981); *Tacon v. Arizona,* 410 U.S. 351 (1973); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Section 1257(3) of Title 28 of the United States Code confers jurisdiction over those questions which have been "specially setup or claimed . . ." under federal law in the state courts. The petitioner has the burden to show that they were presented to that court, and it must demonstrate, expressly or through clear implication in the record, that the federal questions were presented below. If they were not, this Court has no jurisdiction. *Webb v. Webb, supra; Carter v. Kentucky,* 450 U.S. 288 (1981).

The issues contained in the instant petition were not presented to the New York courts. The establishment of religion argument was not raised in any of the briefs or other papers submitted by Carnation. Nor was the federal labor law policy issue presented. The only due process argument made by Carnation was based upon alleged administrative delay in reviewing and processing the complaint. Indeed, in the Appellate Division, Carnation claimed that the issue was whether substantial evidence supported the Commissioner's findings, not whether the use of that standard denied it due process.

Perhaps the most telling indication that Carnation did not raise these issues below is its reliance here upon this Court's decision in *Trans World Airlines, Inc. v. Hardison, supra.* That case is not cited at all in Carnation's brief in support of its motion for leave to appeal to the Court of Appeals. Carnation cited it to the Appellate Division only in support of the proposition that a collective bargaining agreement provision with respect to the assignment of weekend work may be a fair and equitable way to distribute the workload among employees, and thus evidence of lack of discriminatory intent.

Because Carnation did not raise the federal issues below, the New York courts have not had the opportunity to pass upon them. As stated in *Cardinale v. Louisiana, supra* at 438, "it was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." There are sound reasons that such review in the first instance should be denied. First, because the issues have not been raised below, the record concerning them will most likely be inadequate. Second, it is a recognized principle of federalism that state courts should have the first opportunity to pass on the constitutionality of state statutes. *Id.* at 439.

Because Carnation failed to raise the questions of federal law below, the petition should be dismissed for lack of jurisdiction.

POINT II

THE DETERMINATION THAT CARNATION VIOLATED §296.10 OF THE NEW YORK EXECUTIVE LAW, BASED UPON THE FINDING THAT IT DID NOT PRESENT EVIDENCE SUFFICIENT TO DEMONSTRATE UNDUE ECONOMIC HARDSHIP, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION.

A. *The New York Court Applied The Proper Standard To Determine Whether A Reasonable Accommodation Of Clarke's Religious Beliefs Would Cause Undue Economic Hardship To Carnation.*

The New York Court of Appeals in *State Division of Human Rights v. Carnation Co., supra,* set forth the appropriate standard to determine whether the accommodation of Clarke's beliefs would cause undue economic hardship to Carnation. It directed the Division to hold a hearing to determine whether the accommodation would cause "a palpable increase in costs or risk to industrial peace . . ." *Id.* at 875. Upon review of the evidence, the Commissioner determined that Carnation had failed to meet that standard.

With respect to the cost issue, the Commissioner concluded that, based upon the collective bargaining agreement and past practice under it, Carnation could arrange for a lower-grade employee to substitute for Clarke without the need to reclassify that employee. Moreover, Carnation presented no actual cost data with respect to the alternative methods of permitting Clarke to observe his Sabbath. With respect to the issue of industrial peace, the Commissioner found that, with the exception of one grievance which was resolved before a final determination was made, there had been no other complaints filed concerning Carnation's method of accommodating Clarke. The Commissioner properly concluded that mere speculation was insufficient to demonstrate a real

risk to industrial peace. The Commissioner's findings were affirmed and accepted by the Division's Appeal Board and the Appellate Division of the New York Supreme Court. The New York Court of Appeals declined to review them.

In *Trans World Airlines, Inc. v. Hardison, supra,* this Court reviewed the standard to determine reasonable accommodation and undue hardship under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), which contains a prohibition of religious discrimination similar to that in §296.10 of the Executive Law. In that case, the District Court, finding that accommodation of the employee would result in increased costs and would require the employer to violate the seniority provisions of a collective bargaining agreement, ruled for the employer. The Eighth Circuit reversed. This Court in turn reversed, holding that it would cause undue hardship to require the employer to incur substantial additional costs or to violate the collective bargaining agreement in order to accommodate the religious preferences of an employee.

Here the Commissioner has determined that Carnation failed to prove either prong of that test. Accommodation of Clarke will not result in increased costs, nor will it require Carnation to violate the collective bargaining agreement with the Union.[2]

The arguments in Carnation's petition are no more than challenges to those factual determinations. The issues which it purports to raise under *Hardison* would require this Court to assume facts which Carnation failed to prove. Carnation claims that it demonstrated increased costs, risks to industrial peace, and constraints of the collective bargaining agreement.

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[2]Carnation's claim that the Wilson grievance shows that the accommodation would violate the agreement is unfounded. That grievance was settled without any determination interpreting the collective bargaining agreement.

Assuming that unproved economic hardship, it argues that the Appellate Division, in an interpretation of the statute which constitutes the establishment of religion, required it to accommodate Clarke.

That was not the holding of the state court. The Appellate Division affirmed the Commissioner's determination that Carnation had failed to submit evidence sufficient to establish economic hardship. The holding does not preclude an employer from alleging and proving the existence of undue economic hardship. Carnation's failure to meet its burden of proof does not present an issue requiring review by this Court.

B. ***Section 296.10 Of The New York Executive Law Does Not Violate The Establishment Clause Of The First Amendment Of The United States Constitution.***

In *Committee for Public Education and Religious Liberty v. Nyquist, Commissioner of Education of New York*, 413 U.S. 756 (1973), this Court set forth the standard to determine whether a state statute violates the Establishment Clause of the First Amendment to the United States Constitution. To pass constitutional muster, the statute must serve a clearly secular legislative purpose. Second, its primary effect must be neither to advance nor inhibit religion. Third, it must avoid excessive government entanglement with religion.

The provision of the New York Executive Law at issue here, which prohibits employers from discriminating against employees on the basis of Sabbath observance unless the accommodation of those religious beliefs would cause undue economic hardship to the employer, meets the test. The statute has the clearly secular purpose of eliminating discrimination in employment practices. Its effect is neither

to advance nor inhibit religion because it applies neutrally to all religions. Finally, there is no excessive government entanglement with religion because the statute is designed to operate with no government involvement unless an employer discriminates wrongfully.

Carnation has not demonstrated that the statute in question violates any element of that test. That failure is readily explained because Carnation's real dispute is with the Commissioner's factual findings, not with the standards to interpret the statute. Carnation's failure to prove undue economic hardship, and its challenge to that finding, do not present constitutional issues requiring this Court's review.

POINT III

BECAUSE CARNATION CAN ACCOMMODATE CLARKE'S RELIGIOUS BELIEFS WITHOUT VIOLATING THE COLLECTIVE BARGAINING AGREEMENT, THE INSTANT PETITION RAISES NO QUESTIONS INVOLVING FEDERAL LABOR LAW POLICIES.

In another attempt to create a federal question from a purely factual issue, Carnation argues that the Commissioner's decision violates a federal labor law policy favoring the validity of collective bargaining agreements. The Commissioner determined, however, that Carnation could accommodate Clarke without violating the collective bargaining agreement. Indeed, the evidence demonstrates that Carnation has accommodated Clarke as a warehouseman without violating the agreement. Carnation has used replacement workers when there were only two labeler operators, also without violating the agreement. The clause permitting the use of substitute workers of a lower grade so long as they do not work in the higher paid job classification more than 50% of their time in any given 30-day period provides Carnation with yet another vehicle to accommodate Clarke.

The only grievance based upon the accommodation of Clarke was settled, without any determination that the practice violated the agreement nor that the Union concurred in the filing of the grievance by Frank Wilson. No other grievance had been filed with respect to any other aspects of the accommodation, or possible accommodations. Carnation can hardly rely upon its own resolution of a grievance to conclude that the practice necessarily violates the collective bargaining agreement.

Carnation's argument suffers again from misplaced reliance upon this Court's decision in *Hardison*. Accommodation of the employee in that case would have required violation of the seniority clause of the collective bargaining agreement, but the section of the Civil Rights Act at issue there carves out an exception to the accommodation requirements for bona fide seniority clauses. 42 U.S.C. §2000e-2(h). While recognizing that neither a collective bargaining agreement, nor a seniority system contained in it, could be used to violate the statute, this Court held simply that an employer could not be required to accommodate an employee in a manner "inconsistent with [an] otherwise valid agreement." 432 U.S. at 79.

Seniority was not an issue in this case. No clause of the collective bargaining agreement would prohibit Carnation's accommodation of Clarke, and §296.10 of the Executive Law creates no special exceptions applicable to Carnation. To allow Carnation not to accommodate Clarke would permit the agreement to be used to violate the statute. The decision in *Hardison* certainly does not condone that result.

In sum, the evidence is overwhelming that Carnation can accommodate Clarke consistent with its agreement with the Union. It is only by assuming otherwise that Carnation can argue that the accommodation would violate the standard set forth in *Hardison*. Carnation's disagreement with the facts

found by the Commissioner should, however, be of no avail before this Court. The Commissioner's decision does not threaten the collective bargaining agreement, and, accordingly, has no implications for federal labor law policies. Carnation's dispute is essentially factual, and does not warrant review by this Court.

POINT IV

THE APPELLATE DIVISION'S REVIEW OF THE COMMISSIONER'S DECISION UNDER A SUBSTANTIAL EVIDENCE STANDARD DID NOT DENY THE PETITIONER DUE PROCESS OF LAW.

The New York Court of Appeals determined that Carnation must accommodate Clarke unless to do so would inflict undue hardship upon it, and ordered a hearing to determine whether Carnation could demonstrate such hardship. *State Division of Human Rights v. Carnation Co., supra.* The Commissioner found that Carnation had failed to prove hardship, and that decision was affirmed by the Division's Appeal Board and by the Appellate Division, applying a substantial evidence test. Carnation now argues that that standard of review denies it due process of law.

It is well established under New York law that the Commissioner's decisions must be upheld if they are supported by substantial evidence. *State Division of Human Rights v. Bystricky,* 30 N.Y.2d 322 (1972). In reviewing the Commissioner's decision, the Court is free to review the entire record to determine if there is substantial evidence. *300 Gramatan Avenue Associates v. State Division of Human Rights,* 45 N.Y.2d 176 (1978). It did so here. Indeed, §298 of the New York Executive Law dictates that if findings of fact are supported by sufficient evidence on the record considered as a whole, those facts are deemed to be conclusive, and the Commissioner's order cannot be disturbed. N.Y. Exec. Law §298 (McKinney 1982).

Carnation apparently urges that this Court should weigh the evidence, or substitute its own judgment for that of the Commissioner where the evidence is contradictory. Such a standard is not permissible. *State Division of Human Rights v. Columbia University,* 39 N.Y.2d 612, 616 (1976), *cert. denied sub nom. Gilinsky v. Columbia University,* 429 U.S. 1096 (1977). The courts are not permitted to reverse the Commissioner's decision merely because the record might support a conclusion different from that made by the Commissioner. *State Division of Human Rights v. City of Syracuse,* 57 A.D.2d 452 (4th Dep't 1977), *aff'd without opinion,* 43 N.Y.2d 958 (1978).

The substantial evidence standard is not a concept alien to this Court. In reviewing the determination of a federal agency, this Court has recognized that standard to be appropriate in appeals from determinations made after public hearings. *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). The same standard should apply to the Commissioner's determination based upon the public hearing in this case.

A careful reading of Carnation's petition reveals that its argument arises not so much from the Appellate Division's choice of the standard of review, but from the fact that it disagrees with the Commissioner's conclusion that it did not make a reasonable effort to accommodate Clarke. The issue of whether the offering of a lower paying position to Clarke constituted a reasonable accommodation, however, was determined when this case was before the New York Court of Appeals previously. Implicit in that court's decision to remand for a determination of whether the accommodation of Clarke could be accomplished without imposing undue economic hardship on Carnation is the conclusion that Carnation's offer to demote Clarke to a lower-paying Bracket III position did not constitute reasonable ac-

commodation. Thus, that issue was decided long ago, and Carnation had the opportunity to challenge it then if it did not agree.

In sum, Carnation's argument that it has been denied due process of law raises no significant issues requiring determination by this Court. Carnation had an adequate opportunity to present whatever issues it chose to the New York court. The Appellate Division applied a well-established standard of review in passing on the Commissioner's decision. It cannot be said at this time that the review by that court violated any constitutional rights of Carnation.

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Dated: Rochester, New York
January 13, 1983

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In The

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,

Petitioner,

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

REPLY TO BRIEFS FOR RESPONDENTS DARYL CLARKE AND THE STATE DIVISION OF HUMAN RIGHTS

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QUESTION PRESENTED

1. Does this Court have jurisdiction pursuant to 28 U.S.C. §1257(3) to hear the issues raised in Carnation's petition where the issues have been raised explicitly and implicitly at every stage of the proceedings below?

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In The

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CARNATION COMPANY,

Petitioner,

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

REPLY TO BRIEFS FOR RESPONDENTS DARYL CLARKE AND THE STATE DIVISION OF HUMAN RIGHTS

STATEMENT OF THE CASE

Carnation Company [hereinafter "Carnation"] disagrees with the Statement of the Case as set forth in the Brief for Respondent Daryl Clarke [hereinafter "Clarke"] and in the Brief for Respondent New York State Division of Human Rights [hereinafter "NYSDHR"] in opposition to Carnation's petition for a writ of certiorari. In particular, Carnation disagrees with Clarke's characterization of Carnation's extensive efforts to accommodate him in the practice of his religion. Carnation also disagrees with the NYSDHR's statement that it failed to submit cost data in support of its position that accommodating Clarke in the manner he requested would

have resulted in increased costs. (NYSDHR's Brief at 2). Therefore, Carnation respectfully requests that this Court rely on the relevant facts as set forth in Carnation's petition.

POINT I

This Court has jurisdiction to hear the issues raised in Carnation's petition for certiorari.

Carnation's first argument in the petition for certiorari is that *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) [hereinafter *"Hardison"*] laid down the principle that requiring more than "reasonable accommodation" of a particular employee's religious beliefs discriminates against the religious convictions of other employees which creates an establishment of religion contrary to the First Amendment of the United States Constitution. Carnation has consistently raised this argument in the state forums below and, therefore, the issue is properly before this Court.

Carnation's brief before the NYSDHR stated that *"Hardison* is totally dispositive of the issues herein." (Carnation's NYSDHR Brief at 12). Among other things, it quoted the holding in *Hardison* that requiring an employer to give a complainant Saturdays off where no volunteer could be found to work for him:

> [W]ould deprive another of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. (Carnation's NYSDHR Brief at 26).

Elsewhere Carnation's brief specifically points out that Section 296.10 of the New York Executive Law:

> Cannot be construed to require an employer to discriminate against some employees in order to enable others to observe their sabbath. *Hardison, supra,* at p. 81. (Carnation's NYSDHR Brief at 29).

Moreover the NYSDHR read *Hardison* and, thus, knew that the concept of reasonable accommodation was adopted to avoid the establishment problem. Nevertheless the NYSDHR specifically refused to apply *Hardison*. (See Appendix C to Carnation's Petition at 53).

Carnation then appealed to the State Human Rights Appeal Board [hereinafter "Appeal Board"]. Point VI of Carnation's brief is devoted entirely to the establishment argument. After discussing *Hardison*, the brief presents the three prong test laid down in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The point concludes by stating:

> To go beyond [the *Hardison*] test is to invite the unconstitutionality of the statute by imposing the heavier obligations which would be repugnant to the concepts of establishment of religion and excessive religious entanglement. (Carnation's Appeal Board Brief at 62).

The highest state court from which Carnation could obtain review was the New York Supreme Court, Appellate Division, Fourth Department. The Appellate Division was thoroughly familiar with the argument that failure to follow the reasonableness rule laid down in *Hardison* might cause the state statute to violate the establishment clause of the First Amendment since it questioned Clarke's counsel on this point when the case was first before it. *State Division of Human Rights v. Carnation Co.*, 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976), *reversed on other grounds*, 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869 (1977). As Clarke states in an earlier brief to the New York Court of Appeals:

> During oral argument the bench asked counsel for the Complainant and Respondent whether *Parker Seal Co. v. Cummins* . . . then pending before the United States Supreme Court, was dispositive of the issues raised by Complainant. That case was before the Court basically on the First Amendment issue of establishment of religion. (Clarke's Court of Appeals' Brief at 34).

In the present appeal, the Appellate Division again had notice of the establishment issue because Carnation's briefs to the NYSDHR and the Appeal Board were part of the record furnished to it by the NYSDHR. Even though the Appellate Division was fully aware of the establishment argument, Carnation, after citing *Hardison*, repeated its argument that to accept Clarke's interpretation of the statute would require:

> Carnation to discriminate against its other employees. If Carnation were to require other employees to work on Saturdays in Complainant's place . . . it would be guilty of discrimination against its other employees and would be in violation of its collective bargaining agreement. (Carnation's Appellate Division Brief at 26).

This is the essence of the establishment argument in *Hardison* and the basis of the petition to this Court, that is, requiring more than reasonable accommodation involves religious discrimination against other employees which is establishment of religion.

Thus it is abundantly clear that the issue of accommodation to the point of discriminating against other employees or establishing particular religious views has been explicitly raised at each stage of the state litigation. However, there is no requirement that an issue be explicitly raised in the state forum for this Court to obtain jurisdiction. As was stated in *Bryant v. Zimmerman*, 278 U.S. 63 (1928) [hereinafter *"Bryant"*]:

> No particular form of words or phrases is essential, but only the claim of invalidity and the ground thereof be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that it was done, the claim is regarded as having been adequately raised. *Id.* at 67.

In *Bryant*, the realtor did not mention any specific constitutional provision or constitution. Nevertheless, the issue was preserved because, among other things, it was clear that the state's highest court cited authorities which dealt with the constitutional question.

Presbyterian Church v. Hull Church, 393 U.S. 448 (1969) [hereinafter *"Presbyterian"*] presented an even vaguer claim of unconstitutionality. Two local churches sued a church organization to enjoin it from trespassing on their property. In its answer, the church organization stated that the suit violated the "laws . . . of the *United States of America.*" *Id.* at 444, n.3. (Emphasis in the original). On appeal, the church argued that the dispute involved church doctrine and to submit such an issue to a civil court would "destroy the doctrine of separation of church and state". *Id.* Although no mention was made of the establishment clause or the First Amendment, this Court stated: "Petitioners thus clearly raised claims under the First Amendment. . . ." *Id.*

Recently, in *Beck v. Alabama*, 447 U.S. 625 (1980) [hereinafter *"Beck"*], the appellant mentioned that a statute violated several federal constitutional provisions in his petition to the state court but never argued them in his brief, nor did the court decide the case on federal constitutional grounds. In asserting jurisdiction, this Court stated that "[i]t is clear that petitioner did present his federal claims *in some fashion* to the Alabama Supreme Court." *Id.* at 631. (Emphasis added).

Carnation's efforts to raise the establishment issue far surpass those accepted as sufficient in *Bryant, Presbyterian* and *Beck*. The issue was explicitly raised in all forums. Moreover, in the Appellate Division it was raised in numerous ways both expressly and by clear intendment. First, the Appellate Division acknowledged in the first appeal its acute awareness of the "First Amendment issue of establishment of religion". Clarke's Court of Appeals' Brief at 34. Second, in keeping with *Bryant*, the record before the Appellate Division contained the lower tribunal briefs on the establishment issue. Third, following *Bryant*, the authorities cited by Carnation in its brief to the Appellate Division raised the establishment argument. In particular, *Hardison*, which raised the rule of reasonable accommodation to avoid an establishment problem, was cited to the court. Fourth, the principle of *Hardison* was explicitly reiterated to the Appellate Division. In *Presbyterian*, the estab-

lishment issue was raised without naming either the First Amendment or the federal constitution. Mentioning the doctrine of separation of church and state was enough. Carnation's statement that it should not have to discriminate against the religious views of others is an even clearer expression of the concept that one employee's religious views should not be established over those of others. This is especially true where, as here, the Appellate Division was fully cognizant of this argument from a prior appeal, the record, and the cases cited to it, including *Hardison* which held that such discrimination or establishment was to be avoided.

Moreover, it is important to note that the constitutional issue need not be raised at all where the state court "renders an unexpected interpretation of state law" or reverses its prior interpretation. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n.9 (1980) [hereinafter *"Pruneyard"*]. Here the Appellate Division suddenly and unexpectedly rejected all prior New York case law which held that the statute could only require reasonable accommodation. Since the Appellate Division "rendered an unexpected interpretation of state law", Carnation was under no obligation to raise the establishment issue and, therefore, under *Pruneyard*, this Court clearly has jurisdiction. *Id.*

In New York, the NYSDHR is given a strong voice in setting state policy in the area of discrimination. *State Office of Drug Abuse Services v. State Human Rights Appeal Board*, 48 N.Y.2d 276 (1979). Moreover, the Appeal Board sits as a state appellate forum. As the United States Supreme Court has stated: "a State may enunciate policy through an administrative agency, as well as through its courts, and so long as there is an opportunity for judicial review the fact that such review may be denied on the discretionary basis does not make the agency's action any less the voice of the state for purposes of this Court's jurisdiction. . . ." *Pacific Telephone & Telegraph Co. v. Public Utilities Commission of Cal.*, 443 U.S. 1301, 1304 (1979). Since the establishment issue was an issue before the NYSDHR and the Appeal Board which set the policy in this

area, the courts of the State of New York have clearly had an opportunity to pass on the issue.

Nor is there any question that the issue of whether the state is preempted by federal labor law from compelling an employer to accommodate an employee in the observance of his sabbath in a manner which is inconsistent with a valid collective bargaining agreement has been raised at every stage of these proceedings. Carnation briefed and argued this issue to the Appellate Division when this case was first before it. *State Division of Human Rights v. Carnation Co., supra.* Indeed, Clarke devotes six pages of his brief to rebut Carnation's argument that "accommodating Complainant will cause [it] to discriminate against its other employees". Clarke's Appellate Division Brief at 24. The NYSDHR argued that the weight of federal case law under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* had rejected Carnation's argument. Affidavit of Alan J. Saks, Esq., sworn to February 23, 1976, in support of the NYSDHR's Answer to Carnation's Petition for Review, pars. 7-9.

The federal labor law issue was also briefed and argued by Carnation before the New York Court of Appeals when this case was first before it. *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873 N.Y.S.2d 781, 366 N.E.2d 869 (1977). As Carnation asserted "to accede to Complainant's demand . . . would require the Employer to discriminate against its other employees . . . [and] it would be in violation of the Collective Bargaining agreement . . . *Dewey v. Reynolds Metals Co., supra*". Carnation's Court of Appeals' Brief at 16. Moreover, Clarke also briefed and argued this issue. Clarke's Court of Appeals' Brief at 47, n.15. The NYSDHR explicitly raised the issue and discussed it in its brief. NYSDHR's Court of Appeals' Brief at 25. After this Court's decision in *Hardison,* Carnation raised and extensively briefed the issue on its motion for reargument before the New York Court of Appeals, which motion was denied. *State Division of Human Rights v. Carnation Co.*, 51 N.Y.2d 771 (1980).

At the public hearing before the NYSDHR, counsel for Carnation again raised the issue that accommodating Clarke to the disadvantage of the other employees would violate the collective bargaining agreement. Transcript, February 15, 1978, Vol. 1, p. 24. Following the hearing, Carnation briefed the issue as did Clarke. Carnation's NYSDHR Brief at 24-27.

Even more extensively, Carnation argued and briefed the issue that the employer's obligation to accommodate does not take precedence over the collective bargaining rights of other employees on the authority of this Court's decision in *Hardison* to the Appeal Board. Carnation's Appeal Board Brief at 27-31.

Finally, the issue was briefed and argued before the Appellate Division. More specifically, Carnation argued that the provisions of the collective bargaining agreement in regard to rotation of relief days apply equally to all employees and do not discriminate against any of them. "The agreement, in fact, provides a fair and equitable method of distributing the work load among the employees without discrimination against any of them. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Dewey v. Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971)." Carnation's Appellate Division Brief at 26. Accordingly, it cannot be said that the New York courts did not have notice of the federal labor law issue before it and under the holdings in *Bryant*, *Presbyterian*, and *Beck*, discussed above, there can be no doubt that this Court has jurisdiction to review this issue.

Finally, the due process issue has been raised in regard to the lack of substantial evidence to support the decision of the NYSDHR. More particularly, the issue was implicitly raised in Carnation's brief to the Appellate Division. Carnation's Appellate Division Brief at 19, and explicitly raised at pages 13-15 of Carnation's motion to the Appellate Division for leave to appeal to the Court of Appeals. Further, the issue was raised by Carnation in its brief in support of its motion to the Court of Appeals for leave to appeal. As Carnation stated: "[t]he decision below has deprived Carnation of due process of law

and rendered this statute [N.Y. Exec. Law §296.10] unconstitutional as applied." Carnation's Court of Appeals' Brief at 22. Accordingly, this Court has jurisdiction to consider this issue.

POINT II

Section 5601(b)(1) of New York's Civil Practice Law and Rules does not apply to this case.

The NYSDHR argues in its brief that this Court lacks jurisdiction by reason of the fact that Carnation "failed to invoke N.Y. Civ. Prac. Law §5601(b)(1)" and, therefore, has failed to "exhaust all of the possibilities afforded by state procedures for review". NYSDHR's Brief at 5-6. This argument is totally without merit.

Section 5601(b)(1) provides that "an appeal *may* be taken to the court of appeals as of right "where there is *directly* involved the construction of the constitution of the State or of the United States". If, however, the decision was or may have been based upon some other ground, permission to appeal must be sought pursuant to Section 5602. See *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1975). In *People ex rel. Ryan v. Lynch*, 262 N.Y. 1, 186 N.E. 28 (1933) the court granted a motion to dismiss an appeal as of right on the ground that the construction of the United States Constitution was not directly involved. Appellant was contesting the Tax Commissioner's interpretation of the word "resident" in Section 350 of the Tax Law which interpretation subjected him to substantial tax liability. In dismissing the appeal, the court stated:

> In a certain sense every question as to the enforcement of a statute involves its constitutionality, but we have repeatedly held that this is not enough. An appeal upon the ground asserted here must present to us directly and primarily an issue determinable only by our construction of the Constitution. The decision below was not necessarily based directly on constitutional grounds. Although it appears on the record that the Federal question was presented below (citation omitted), that is not conclusive on our right to review. *Id.* at 4.

In the instant case, the Appellate Division unanimously affirmed the Decision and Order of the Commissioner on the ground that the Decision and Order appealed from was supported by substantial evidence. Since the appellate court's decision "was not necessarily based directly on constitutional grounds", an appeal as of right did not lie. 262 N.Y. at 4. Accordingly, Carnation sought leave to appeal to the court of appeals by permission, which leave was denied. *State Division of Human Rights v. Carnation Co.*, 57 N.Y.2d 606 (1982). Thus Carnation has met the highest state court requirement and jurisdiction is proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Carnation's petition for a writ of certiorari should be granted.

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